Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

**MARK JAMELL, an infant
who sues by his mother and next friend,
CAROL A. JAMELL, and
CAROL A. JAMELL, individually,**

Petitioners,

v.

**CITY OF CHESAPEAKE,
a municipal corporation,**

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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61 pp.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Court of Appeals erred in affirming the trial court's order granting summary judgment for the defendant.

2. Whether or not the Court of Appeals erred in not requiring completion of discovery before ruling on a motion for summary judgment.

3. Whether or not the Court of Appeals erred in not considering the affidavits submitted by the plaintiff in determining if there was sufficient evidence to submit the factual issue to a trial jury for determination.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ORDERS ISSUED iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 9

CERTIFICATE OF SERVICE 10

APPENDIX 11

TABLE OF AUTHORITIES

STATUTE

Code of Virginia Section 15.1-291 2

CASES

Burke Royalty Co. v. Walls,
616 SW 2d 911 (Tex 1981) 6

Dosier v. Miami Valley Broadcasting Corp.,
656 Fed 1295 (9th CA 1981) 8

Ferguson v. Ferguson,
212 Va 86 181 SE 2d 648 (VA 1971) . . . 3

First Chicago International v. United
Exchange Co. Ltd.,
836 F 2d 1375 (D.C. Cir.1988) 8

International Armament Corp v. King,
674 SW 413 (Tex App 13 Dist 1984) . . 6

Sutra v. Schering Corp.,
73 F3d 13 (2nd Cir. 1995) 7

REPORTS OF OPINIONS IN THIS CASE

1. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

MARK JAMELL, et als

v. CIVIL ACTION NO. 2:95 cv249

CITY OF CHESAPEAKE

Opinion and Order
issued July 28, 1995.

2. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2550

MARK JAMELL, et als

Appellants

v.

CITY OF CHESAPEAKE,

Appellee

Unpublished per curian opinion
issued June 26, 1996

JURISDICTION

Petitioner, a citizen of New Mexico, brought this action in the United States District Court of the Eastern District of Virginia with jurisdiction based on diversity of citizenship pursuant to 42 US Code 1332 for damages alleging personal injury sustained as a result of the gross negligence of defendant, a Virginia incorporated city in the operations of a city park. Defendant filed a Motion to Dismiss under Rule 12(b)(6) FRCP for failure of situation to allege facts constituting gross negligence and for failure to allege facts that would entitle petitioner to recover punitive damages against respondent. The trial judge by order dated July 28, 1995, treated respondent's Motion to Dismiss as a Motion for Summary Judgment and Dismissed this cause of action. Petitioner appealed the dismissal to the United States Court of Appeals, Fourth Circuit. In an unpublished per curiam opinion issued June 26, 1996, the Fourth Circuit affirmed the lower court's Order of Dismissal. Petitioner seeks the issuance of a Writ of Certiorari of the court under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Mark Jamell, age four (4), went with his mother, Carol A. Jamell, to a City of Chesapeake, Virginia, public playground park in March, 1991. Mark went up a ladder to a platform with a sliding board and jungle gym. He jumped from the platform to the ground and broke his leg.

The Complaint alleges the City of Chesapeake was grossly negligent in failing to provide a protective guardrail to prevent a child from jumping from the platform to the ground below, for failure to notify and warn users of the height, weight and age limitations, for use of the slide board, for

failure to provide the requisite surface mandated by industry standards, for failure to have a person in charge of the park and for failure to correct defects in the playground equipment.

The City of Chesapeake in its answer to the Complaint among other matters denied the Complaint stated a cause of action permitting recovery under the theory of gross negligence as a matter of law and that it failed to allege facts entitling recovery of punitive damages.

The City of Chesapeake filed a Motion to dismiss pursuant to Rule 12(b)(6) Federal Rules of Civil Procedure stating the Complaint failed to state a cause of action based on gross negligence by the City and that punitive damages are as a matter of law not recoverable against a municipality in Virginia. The Code of Virginia Section 15.1-291 grants immunity from liability to a municipality for torts based on simple negligence and permits recovery based on torts where the municipality is grossly negligent. The City of Chesapeake attached as exhibits affidavits of City employees, City work orders and reports of other cases involving sovereign immunity of punitive damage of a political subdivision of Virginia. After further pleadings the Motion to Dismiss was treated as a Motion for summary Judgment under Rule 56c Federal Rules of Civil Procedure and set for hearing before the court on July 20, 1995. On the day before the hearing, affidavit of factual matter and expert opinions had not been filed with the Court but were tendered by plaintiff at the hearing, The Court held there was no dispute of any material fact necessary to establish any right of plaintiffs to recover damages in the case and granted City of Chesapeake motion for summary judgment and dismissed the action.

The Court, although it declined to accept the two

affidavits tendered by plaintiff at the hearing as not having been timely filed in its written opinion, stated ". . . even if the two documents had been timely filed, it would not have affected the outcome of the motion for summary judgment", clearly indicating the affidavits had been considered in its decision to dismiss the action.

The Circuit Court of appeals in its order affirmed the trial court's order of dismissal, stating in a footnote thereto that the District Court declined to consider the affidavits not timely filed and consequently it, too, did not consider the untimely affidavits. The District Court clearly considered the affidavits and the Circuit Court of Appeals erred in not also considering these affidavits in its determination that the "Jamells presented no evidence creating a genuine issue of material fact with respect to the issue of gross negligence."

ARGUMENT

The legislature of Virginia has granted immunity to cities, counties and towns in the operation of recreational facilities for negligence unless the negligence be gross or wanton.

Virginia in Ferguson v. Ferguson, 212 Va 86, 92, 181 S.E.2d 648, 653 (1971) the court defined gross negligence as "that degree of negligence which shows such indifference to others as constitutes utter disregard of prudence of the safety of a guest. It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness".

The complaint alleged facts in paragraph 5 on the part of the City that constituted gross negligence and in plaintiffs affidavits, considered by the court, presented facts that were

sufficient to submit to a jury, under proper instruction, the question of gross negligence of the City.

WHY WRIT OF CERTIORARI SHOULD BE GRANTED:

1. THE KING CAN DO NO WRONG IS ANCIENT AND BARBARIC.

2. OUR CHILDREN AND THEIR FUTURE IS THE FOUNDATION OF CIVILIZATION.

3. TERRORISM IS ATTEMPTING TO DESTROY OUR AMERICANISM.

4. THE DISCOVERY PROCEEDING IS THE RECORD AS STIPULATED BY COUNSEL.

A. THIS PLAYGROUND DID NOT HAVE ANY SUPERVISION OR ANY ONE AT ANY TIME FOR CONTROL. NO ONE WAS EVER EMPLOYED.

B. THE SLIDING BOARD HAD A DEFECT FOR AN INDEFINITE TIME: WITH OPENING PERMITTING ANY CHILD TO QUIT SLIDING AND TO JUMP (NOT DENIED). NO REPORT WAS EVER MADE.

C. EQUIPMENT (SLIDING BOARD) EXPOSED TO ALL WEATHER CONDITIONS, MAKING IT UNSAFE FOR CHILDREN, WITHOUT ANY SUPERVISION (NOT DENIED)

D. FAILURE TO HAVE PROPER SAND FOR LANDING BY CHILDREN FROM TALL SLIDING BOARD (NOT DENIED).

* ONLY AND ALL TESTIMONY OF DEFENDANT: "NO ONE COMPLAINED."

** CIRCUIT COURT OF THE CITY OF CHESAPEAKE RULED ON TWO OCCASIONS BY FORMAL ORDER "THAT THE NEGLIGENCE AS ALLEGED WAS A QUESTION FOR THE JURY.

*** THE CASE WAS REMOVED FROM THE STATE COURT WHEN THE PLAINTIFF MOVED TO NEW MEXICO, AND IT WAS DESIRED THAT A JURY, OTHER THAN FROM THE CITY OF CHESAPEAKE, DETERMINE THE ISSUES.

A. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT.

A review of the allegations and the facts submitted to

and considered by the trial court establish a basis for a finding by a jury at trial that the City was grossly negligent. The trial judge erred in his evaluation of the evidence. The complaint alleged the equipment was defective for failing to provide guard rails around the platform to prevent a child using the equipment from going off the platform to the hard ground below. Whether the four year old jumped or unintentionally fell through the openings in the sides of the platform is not determinative of the negligence of the City. Whether the City or some factory had designed, built and erected the equipment is not determinative. The City cannot ignore its responsibility to operate playground equipment safely. The City did not place signs warning users, including adults who brought children to play on the equipment, of the safe minimum height, weight and age of children users. Additionally, cushioning material such as sand of an adequate depth to lessen the force of impact of children who fall, jump or slide from the equipment is a common sense part of playground equipment. An alternative would be a park attendant who would be present to supervise safe use of the playground equipment.

In International Armament Corp. v. King, 674 SW 2d 413 (Tex App 13 Dist. 1984) page 416, the court stated, "In determining whether there is some evidence of the jury's finding of gross negligence, we must look to all the surrounding facts, circumstances and conditions, not just individual elements or facts. Burke Royalty Co. v. Walls, 616 S.W. 2d at 922. The existence of gross negligence need not rest upon a single act or omission but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence."

Taken as a whole the allegation and the facts in the

exhibits submitted to and considered by the court provide a basis for presenting the case to a jury for determination of gross negligence by the City. The Court of Appeals erred in not overruling the trial court's order of dismissal.

B. THE COURT OF APPEALS ERRED IN NOT REQUIRING THE COMPLETION OF DISCOVERY BEFORE RULING ON THE MOTION FOR SUMMARY JUDGMENT.

The pretrial order in this case issued by the trial court required discovery to be completed by the plaintiff on or before August 28, 1995. Mandatory disclosure was to be completed by August 28, 1995. All forms of discovery with respect to expert testimony was to be completed by October 12, 1995. Trial was set for December 4, 1995.

The trial court did not give plaintiff time to complete its discovery of the evidence before it ruled on the Motion to dismiss. In Sutra v. Schering Corp., 73 F3d 13 (2nd Cir. 1995), an action by a pharmaceutical salesman against his former employer for allegedly violating the Age Discrimination in Employment Act in firing him, the court stated, page 15, "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The court stated, page 18, "a party opposing a motion for summary judgment "must have had the opportunity to discover information that is essential to his opposition to the motion." Trebor Sportswear Co. v. Limited Stores, Inc., 865 F.2d 506, 511 (2nd cir. 1989) quoting Anderson v. Liberty Lobby Inc., 477 U.S. at 250 n. 5, 106 S.Ct at 2511 n. 5). Summary judgment was entered before

any discovery had taken place. In these circumstances, it cannot be said that plaintiff had a full and fair opportunity to show that Schering's articulated reason for his dismissal was pretextual." The order of the district court entering summery judgment was vacated and the cause remanded.

See also First Chicago International v. United Exchange Co. Ltd., 836 F 2d 1375 (D.C. Cir.1988) where the court held at page 1381, "Accordingly, because in the absence of a waiver, summery judgment is appropriate only after plaintiff has had a full opportunity to conduct discovery, we conclude that it was premature for the district court to dismiss the case against Petra and PIBC without first permitting discovery on the merits."

The ruling of the district court in the Motion to dismiss (Motion for Summary Judgment) was premature inasmuch as discovery by plaintiff had not been completed. The Court of Appeals did not comment on this issue although it was raised by plaintiff in the oral argument before the Court of Appeals.

C. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE AFFIDAVITS TENDERED TO THE DISTRICT COURT.

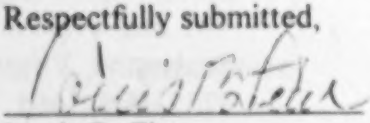
The district court had considered the affidavit in its order dismissing the cause of action. If it is to review the order fully it must review the evidence considered by the lower court. In Dosier v. Miami Valley Broadcasting Corp., 656 Fed 1295 (9th CA 1981), at page 1800, the court stated, "We may affirm a summary judgment only if it appears from the record, after viewing all the evidence and factual information in the light most favorable to the appellant, that

there were no genuine issues of material fact and that appellee is entitled to prevail as a matter of law." The appellate court did not review all the evidence considered by the trial judge inasmuch as it refused to review the affidavits tendered by plaintiff although these affidavits were considered by the trial judge. The court of appeals erred in not considering all the evidence considered by the trial court and accordingly could not validly conclude there were no genuine issues of material fact.

CONCLUSION

For the foregoing reasons, Petitioners, Mark Jamell and Carol A. Jamell, request this court to grant a writ of certiorari in this matter.

Respectfully submitted,



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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested, forty copies of the foregoing Petition for Writ of Certiorari to the Clerk's Office of the Supreme court of the United States and mailed three (3) copies to counsel of record for the Respondent, I. Jeffrey Salb, Breeden, MacMillan and Green, 1700 First Virginia Tower, 555 Main Street, Norfolk, Virginia, 23510, on September 19, 1996.

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No._____

In The Supreme Court Of The United States

OCTOBER TERM, 1995

**MARK JAMELL, an infant
who sues by his mother and next friend,
CAROL A. JAMELL, and
CAROL A. JAMELL, individually,**

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**CITY OF CHESAPEAKE,
a municipal corporation,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

APPENDIX

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APPENDIX

Opinion and order of United States Court of Appeals for the Fourth Circuit, No. 95-2550, Jamell v. Chesapeake issued June 26, 1996	A
Opinion and Order of United States District Court Eastern District of Virginia, Civil Action 2:95 cv 249 Jamell v. Chesapeake issued July 28, 1995	B
Complaint in United States District Court, Eastern District of Virginia, Civil Action 2:95 cv 249 Jamell v. Chesapeake filed March 13, 1995	C
Motion to Dismiss - Jamell v. Chesapeake Civil	D
Action 2:95 cv 249 filed May 26, 1995	E
Order on Pretrial Conference Jamell v. Chesapeake, Civil Action 2:95 cv 249 filed June 22, 1995	F
Affidavit of H. R. Schippell in Jamell v. Chesapeake dated July 18, 1995	G
Affidavit of Dan E. Griffin in Jamell v. Chesapeake dated July 18, 1995	H

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2550

MARK JAMELL, an infant who sues by his mother as next friend Carol A. Jamell; CAROL A. JAMELL, individually,

Plaintiffs - Appellants,

versus

CITY OF CHESAPEAKE, A Municipal Corporation,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Senior District Judge. (CA-95-249-2)

Argued: June 3, 1996

Decided: June 26, 1996

Before WIDENER, WILKINS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Louis Bernard Fine, Henry Lewis Allen, FINE, FINE, LEGUM, FINE, Virginia Beach, Virginia, for Appellant. Thomas Jeffrey Salb, BREEDEN, MACMILLAN & GREEN, P.L.C., Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Mark Jamell and his mother, Carol A. Jamell, appeal from the district court's grant of summary judgment in favor of the City of Chesapeake, Virginia. The Jamells sued the City after mark sustained injuries while he was using playground equipment at a park owned and operated by the City. The suit alleged that the City was grossly negligent' by failing to provide various safety features on the equipment, failing to warn of dangers, and failing to properly maintain the equipment. The Jamells sought compensatory and punitive damages. The City filed a motion for summary judgment. On July 28, 1995, the district court granted the motion, holding that the Jamells presented no evidence creating a genuine issue of material fact with respect to the issue of gross negligence. This appeal followed.

After carefully considering the record, the briefs and the arguments of the parties, we conclude that the district court properly granted the City's motion for summary judgment.

Accordingly, we affirm for the reasons stated in the district court's thorough opinion. See Jamell v. City of Chesapeake, No. 2:95cv249 (E.D. Va. Jul. 28, 1995).

1 Under Virginia law, a plaintiff must prove gross negligence to recover from a municipality for injuries at a "playground or other recreational facility, See Va. Code § 15.1-291.

2 On appeal the Jamells relied in part on certain affidavits submitted to the district court after summary judgment had been awarded to the City. By order dated August 4, 1995, the district court declined to consider these affidavits because they had not been timely filed. We find no error in this ruling, and consequently we, too, have not considered the untimely affidavits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, an infant who
sues by his mother as next friend CAROL A. JAMELL,
and
CAROL A. JAMELL, individually,

Plaintiffs,

v. CIVIL ACTION NO. 2:95cv249

CITY OF CHESAPEAKE,
A Municipal Corporation,

Defendant.

OPINION AND ORDER

I.

On March 13, 1995, plaintiff Mark Jamell (Mark), an infant, by his mother and next friend, Carol A. Jamell, and Carol A. Jamell (Carol) instituted this action to recover damages for injuries received by Mark, and funds expended in medical

expenses by Carol for Mark, against City of Chesapeake (City), a municipal corporation in Virginia. The complaint alleges that on March 24, 1991, City had before and on said date owned and operated Locke Park in City; that the Park contained playground and sliding board/jungle gym equipment; that the city was grossly negligent in failing to provide a slide board unit with proper safety features, including a protective guardrail to prevent a child from falling through or getting off the slide; that defendant failed to warn plaintiff and others upon entrance, of the height, weight and age limit for use by the child and proper soft material surface in and about the slide area; that defendant: f ailed to provide the requisite surface mandated by industry standards; that "Mark Jamell, a child of four years of age, states that the defendant failed to provide the necessary and proper care and attention to the sliding board unit and therefore was grossly negligent" (Par. 6 of complaint); that on or about March 24, 1991, defendant failed to have anyone in charge of the park

and defendant failed to correct the defects in the equipment; that Mark got on the slide operated by City, and was unaware of the condition of the sliding board; that the gross negligence of defendant set out in the complaint caused Mark to fall and injure himself; and that Carol has incurred medical expenses on behalf of Mark. Plaintiffs seek compensatory and punitive damages from the City.

City filed its answer and defenses on May 26, 1995, admitting it owned and operated the recreational park known as Locke Park which was for use of children and adults. It denied each allegation of any negligence or lack of due care or failure to properly inspect and maintain the park. Further, it denied it was guilty of any gross or wanton negligence and denied that the complaint set forth a cause of action against it. At the same time, City filed a Rule 12(b)(6) motion to dismiss for failure to state a cause of action. Particularly, City asserts that the complaint fails to allege facts sufficient to meet the test of

"gross negligence" which it must meet to comply with the provisions of the Virginia Statute, Virginia Code Section 15.1-291'. Secondly, continuance and asserted he would file such affidavits he felt necessary. The Court agreed to grant the request and counsel agreed the motion would be continued and heard on July 20, 1995 at 2:00 p.m. o'clock.

At the hearing on July 20th, counsel for plaintiffs sought to file what appears to be a statement of the qualifications of Dan Griffin with photo copies of pages from some type of handbook for playground safety regulations. Defendant objected to it being filed. It was marked for identification as Plaintiffs, Exhibit 1, but not admitted. The Court advised it would later decide whether it could be filed. While counsel for plaintiffs stated during oral argument on July 20th that he had sent the Clerk's Office affidavits to be fled in opposition to the motion for summary judgment, no such affidavits have been received by the Clerk or the Court as of this date.

II.

A.

Carol's deposition sets out that on the day of the accident, at about 3 o'clock, Carol and a friend had gone with Mark to Locke Park. After refreshments, Mark went to play on the gymnasium or the playground area. The playground area was full of children. Carol and her friend were seated in the picnic area at a picnic table reading the newspaper. She could see the playground area from where she sat. Mark had played for about a half an hour while she read a newspaper. While she was reading the newspaper, a man brought Mark over to her. Mark had a bloody nose, had sand on his face and was crying. The man said that Mark had fallen and that his knee hurts. She took Mark to her car and noted a large knot on his thigh. She then took him to Patients First and had an X-ray and learned his leg was broken. She did not know the man who brought Mark to her and did not get his name. At Mark's direction, she marked

on a photograph with an "X" the point where Mark told her he fell from and with an -0- where he said he landed on the ground. She agreed that the only person who knows where Mark fell from and landed is Mark. She said Mark told her he was on the slide and fell from it. Mark's testimony is hereafter set forth.

B.

The affidavits filed by City in support of its motion for summary judgment will be individually dealt with.

1. The affidavit of Patricia L. Mellon, Liability Claims Specialist for City for the past IO years, asserts that she assists in the coordination, investigation and resolution of claims against City; that as a result of her investigation, she was/unable to find any suggestion that any lawsuit had ever been filed as a result of any injury at the playground equipment in Locke Park and particularly for the period of five years prior to the alleged date of Mark's accident. Nor could she f ind any notice f rom any individual with regard to allegedly hazardous conditions on the sliding board or play equipment; and she has no personal knowledge of any lawsuit or claim having been presented on behalf of any person as a result of injuries at the park.

2. The affidavit of J. Pat Kallaher, Superintendent of Buildings and Grounds, including grounds in the parks, for City for the past 14 years, asserts that the playground equipment at Locke Park was purchased and installed by the Manufacturer's Representative of Miracle Recreational Equipment Company

(Miracle) in 1987; that it is a well-known manufacturer of said equipment; that City neither designed, built or installed said equipment and has not modified it since it was originally installed; that it had been maintained by City since its installation; that there is a standard procedure for inspection of the park and equipment monthly and such was being done in 1990 and 1991; and that to the best of his knowledge been presented for injury or damage as a result of the condition of the equipment or the sand base material since the installation of the equipment in 1987 , Attached to his affidavit are copies of the purchase order, et seq.

3. Affidavit of Barbara 0. Olfers, a Crew Supervisor of Parks, who has worked for the City some 17 years, asserts that she makes inspections of parks and playgrounds; that for four months prior to Mark's injuries of March 24, 1991, she inspected the equipment in Locke Park in December 1990, January 1991, February 1991 and March 12 or 13, 1991. Copies of her inspections are attached which show that she personally checked the playground equipment and the sand base. It is also shown that from time to time since the original installation, sand has been added to the base and it had been roto-tilled in December 1990. Further affiant says she did not know of a complaint ever being made regarding depth of the sand.

III.

Defendant has moved the Court to strike plaintiffs f *s* motion f or an award of punitive damages grounded in the assertion that except where permitted by statute, punitive damages may not be awarded against a municipality in Virginia. Counsel have not brought to the attention of the Court any such statute and

there is no such statute. Nor have counsel called to the attention of the Court any decision of the Supreme Court of Virginia holding that punitive damages have been or may be awarded against a Virginia municipality. However, there are two decisions of circuit courts of Virginia, one written by Judge Bernard G. Barrow, then of the Circuit Court of Virginia Beach, in the case of McDonnell v. Hampton Roads Sanitation District, 5 Va. Cir. 149 (1984), and the other by Judge John F. Daffron, Jr. of the Circuit Court of Chesterfield County in the case of Wilson v. Commonwealth of Virginia, 17 Va. Cir. 144 (1989), each holding punitive damages are not recoverable against a municipal corporation. In City of New-po ncerts, Inc., 453 U.S. 247, 259-260, 101 S. Ct. 2748, 2756 (1981), the court dealt with the question of whether punitive damages might be awarded against a municipal corporation. In holding punitive damages were not recoverable against a municipal corporation, it pointed out that at the time Congress enacted Section 1983 "the immunity of a municipal corporation from punitive damages at common law was not open to serious question and while a municipality, like a private corporation, was to be treated as a natural person and subject to suit for a wide range of tortious activity, but such understanding "did not extend to the award of punitive or exemplary damages." The opinion further pointed out that the "courts that had considered the issue were virtually unanimous in denying such damages against municipal corporations," (citations omitted) [and] "has persisted to the present day in the vast majority of jurisdictions."

In the opinion, the court cited numerous cases from the state courts holding that punitive damages should not be awarded against municipal corporations - as they viewed them as contrary to public policy and such an award would burden the

very taxpayers and citizens for whose benefit the wrongdoer was being chastised. In footnote 21, 453 U.S. at 260, 101 S. Ct. at 2756, the court points out that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." Finally, the court concluded, "[I]n sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials." 453 U.S. at 271, 101 S. Ct. at 2762. See also Kentucky v. Graham, 473 U.S. 159, 167, 105 S. Ct. 3099, 3106, n.13 (1985); Angell v. Leslie, 832 F.2d 817 (4th Cir. 1981); Heritage Homes of Attleboro v. Seekonk Water District, 670 F.2d 1 (Ist Cir. 1982), cert. denied, 102 S. Ct. 2934; Haynesworth v. Miller, 820 F-2d 1205 (D.C. Cir. 1987); Wolf v. City of Wichita, 833 F.2d 842 (10th Cir. 1989); Gregory v. Chehi, 843 F.2d III (3rd Cir. 1988); Wilson v. Citv of Wheeling, 19 W. Va. 323, 350 (1882); Fairbanks v. Citv of Branch, 733 F.Supp. 1447 (M.D. Fla. 1989); Jones v. City of Chicago, 639 F.Supp. 140 (N.D. Ill. 1986); 57 Am.Jur.2d p 635, subject Municipal County, School and State Tort Liability, par. 694. However, even if the City was not immune from punitive damages, the evidence in this case would not justify an award of punitive damages.

IV.

Jurisdiction of this Court is grounded in the allegations of diversity. Since this action arose in Virginia and this suit was filed in Virginia, Virgini a law applies. Piper Aircraft Co. v. Reyno, 454 U.S. 235,, 243, 102 S. Ct. 252, 259 (1981); Day Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4, *96 S.* Ct. 167, 168 (1975); In re Natahala Village, Inc., 976 F.2d 876, 880 (4th Cir. 1992); Thornton v. Cesna Aircraft Co., 886 F.2d 85, 87 (4th Cir. 1989).

In order for plaintiffs to recover in this action, they must establish that City was guilty of gross or wanton negligence.

The legislature of Virginia has given immunity to cities, counties and towns in the operation of recreational facilities for negligence unless the negligence be gross or wanton. The Code of Virginia Section 15.1-291 provides:

> Section 15.1-291. Liability of counties,, cities, and towns in the operation of recreational facilities. - No city or town which shall operate any bathing beach, swimming pool, park, playground, skateboard facility, or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents-in the maintenance or,operation of any such recreational facility.
>
> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute. (Code 1950, Section 15-714; 1962, c. 623; 1979, c. 277; 1990, c. 18.)

In Virginia "the law recognizes threedegrees of negligence, (1) ordinary or simple negligence, (2) gross, and (3) willful, wanton and reckless Grif f in v. Shivelev, 227 Va - 317, 315 S. E. 2d 210, 212 (1984).

The distinction between simple or ordinary negligence,

gross negligence and wanton negligence is one of degree. We need not here be concerned with wanton negligence as that is of a higher degree than gross negligence. Negligence in its broad term is the lack of reasonable or ordinary care, the doing of an act an ordinarily prudent person would not have done under the circumstances or the failure to do what an ordinarily prudent person would have done under the circumstances. To establish negligence there must be violation of a legal duty to use reasonable care, the violation of which proximately causing injury to another or the failure to exercise that degree of care which a reasonably prudent person would have exercised under the circumstances. In Gossett v. Jackson, Va. , 457 S.E.2d 97, 100 (1995), the court defined simple negligence "as the failure to exercise 'that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another. I" citing Griffin v. Shiveley, 227 Va. 317, 321, 315 S.E.2d 210, 212-13 (1984).

To "constitute actionable negligence, a legal duty must exist, .and there must be a violation of that duty with resulting damage. Burdette v. Marks, 244 Va. 309., 421 S.E.2d 419,, 420 (1992). Negligence "constitutes an actionable tort only when it is shown to be the proximate cause of an injury." Farren v. Gilbert, 224 Va.. 407, 297 S.E.2d 668, 671 (1982).

The mere happening of an accident is not proof of negligence. Edlow v. Arnold, 243 Va. 345, 415 S.E.2d 436 (1992). Nor may negligence be presumed from the mere occurrence of damages. Parham v. Albert, 244 Va. 73, 418 S.E.2d 866 (1992). The evidence must prove more than a probability of negligence. Page v. -krnold, 227 Va. 74, 314 S.E.2d 57, 61

(1984). The burden of proof Of negligence rests solely on the plaintiff and does not shift. Rogers v. Marrow, 243 Va. 162, 413 S.E.2d 344 (1992). A defendant has no duty to prove he was not negligent, because plaintiff has the af f irmative burden of proving negligence an the part of the defendant. Davoudlarian v. Krombein, 244 Va. 88, 418 S.E.2d 868 (1992).

Before a party "is entitled to an instruction on negligence or contributing negligence . . . there must be more than a scintilla of evidence introduced on the subject. Yeary v. Holbrook, 178 vA. 323, 397 s.e.2D 824, 827 (1990). See also Charleston Area Medical Center, Incorporated v. Blue Cross and Blue Shield Mutual of Ohio, Incorporated, 6 F.3d 243, 248 (4th Cir. 1993); Lust v. Clark Equipment Co., 792 F.2d 436, 437 (4th Cir. 1990).

To recover "against the owner of premises, an injured invitee must first establish the existence of an unsafe condition on the premises, Kendrick v. Vaz, Inc., 244 Va. 380, 421 S.E.2d 447, 450 (1992).

Gross negligence is the "absence of slight diligence or want of even scant care." Colby v. Boyden, 241 Va. 125, 400 S.E. 2d 184, 189 (1991). In Meagher v. Johnson, 239 Va. 380, 389 S.E.2d 310, 311, the court held that Mea gher's acts "do not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard of prudence. .[W]e hold as a matter of law, that Meagher's acts did not constitute gross negligence . . .. 11 "Gross negligence . . . requires proof of something more than the lack of ordinary care. Reed v. Spencer, 187 Va. 530, 535, 47 S.E.2d 359, 361 (1948), Community Motor Bus Company, Inc. v. Windley, 224 Va. 687, 299 S.E.2d 367, 369 (1985). In

Windley, the court defined gross negligence by citing its definition found in Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971). "Gross negligence is that degree of negligence which shows indifference to others as constituting an utter disregard of prudence amounting to a compl@ete neglect of the safety of the guest. It must be such a degree of negligence as would shock fair minded persons although something less than willful recklessness." Windley, 367 S.E.2d at 369.

While issues of causation are to be decided by the Jury, "whether the evidence is sufficient to create a jury issue is solely a question of law to be determined by the court.

Charleston Area Medical Center, 6 F.3d at 247 (4th Cir. 1993); Miller, 608 F.2d at 981, n.8. In diversity cases where the "sufficiency of the evidence to create a jury question is presented, this court resolves the issue based on federal rule." Charleston Area. Medical, 6 F.3d at 247; Watchford v. S. J. Groves & Sons Co., 405 P.2d 1061, 1065-66 (4th Cir. 1969). See also Brendles Stores, Incorporated, 978 F.2d 150, 157 (4th Cir. 1992).

"That rule presents the question whether there is evidence on which a jury properly can base a verdict." Id.

V.

On a motion for summary judgment, the Court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. Nebraska v. Wyoming, - U.S. *113 S.* Ct. 1689, 1694 (1993); Arderson v. Liberty Lobby, Inc, 477 U.S. 242, 255, *106 S.* Ct. 2505, 2516 (1986); Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.),

cert. denied, 115 S. Ct. 67, and cert. denied, 115 S. Ct. 68 (1994). The plaintiffs are entitled to have the credibility of all of their evidence presumed. Even so, the opposing parties "must demonstrate that a triable issue of fact exists, they may not rest upon mere allegations or denials." Anderson, 477 U.S. at 248, *106 S.*, Ct. at 2510; Shaw, 13 F.3d at 798. A mere scintilla of evidence supporting the case is insufficient. Id.; Charleston Area Medical Center, 6 F.3d at 248. Rule 56(e) makes clear "that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. First National Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289. 88 S. Ct. 1 1592-1593 (1968). The non-mover's contention the facts are in dispute will not suffice. White v. Boyle, 538 F.2d 1077 (4th Cir. 1976). Once the moving party states "in an affidavit sufficient facts to sustain a motion for summary judgment in his favor, the burden [shifts to the opposing party] to establish that there is a material issue of fact.'" Catawba Indian Tribe v. State of South Carolina, 978 F.2d 1334, 1341 (1992), cert. denied, 113 S. Ct. 1415 (1993). As pointed out in Atkinson v. Bass, 579 F.2d 865, 966 (4th Cir.), cert. denied, 439 U.S. 1003 (1978), when defendant files a motion for summary judgment "Positive action was demanded of plaintiff, F.R.Civ.P. 56(e) explicitly admonishes that he could not then simply 'rest' on his complaint - that he must affirmatively respond." Continuing, the court pointed out that plaintiff did nothing and was subject to the discipline of the rule which provides "[I)f he (plaintiff) does not so respond, summary judgment, if appropriate, shall be entered against him (plaintiff]." (Citations omitted). The failure of a litigant to file counter-affidavits or depositions may be treated as a conscious waiver, and a "failure to conduct any discovery or submit any

opposing affidavits . . . can only be viewed as a waiver of such rights, Morrissey v. William Morrow & Co., Inc., 739 F.2d 962, 966 (4th Cir. 1984), cert. denied, 469 U.S. 1216 (1985). See also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994), cert. denied, 115 S. Ct. 1254 (11095). In Cray, the court pointed out that under Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), the moving party is entitled to summary judgment under Rule 56 against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which party will bear the burden of proof at trial.

The Supreme Court of Virginia dealt with the above quoted statute and what constituted gross negligence in Frazier v. City of Norfolk, 234 Va. 388, 362 *S* E.2d 688, 690 (1987) holding that the General Assembly by the statute "intends to limit the civil liability of municipalities in the maintenance and operation of any recreational facilities to cases of gross negligence." There, the court summarized the evidence which shows the injured party was 13 years of age. He was attending a convention at Chrysler Hall and performing Keith a church choir by playing the drums. He was seated at the drums in the rear of the orchestra pit which was in f ront of the stage. It was a platform which could be positioned level with or below the stage. At time of the accident, the pit had been lowered so that the-re was a gap between the rear of the pit and the front of the stage. There was no barrier or railings in place on the rear perimeter of the pit platform. In trying to retrieve a drum stick which plaintiff had dropped, he leaned back on his stool, lost his balance and went over and was injured when he fell through the gap 18 feet into the basement of the building. Testimony showed the city was in violation

of its own building code because railings were not in place on the pit platform, and that the city possessed barriers specifically designed to provide protection against falls through the gap. Plaintiff also presented evidence that 2 years prior to this accident a 6 year old child fell from the pit into the basement when pit barriers were in place. The trial court directed a verdict for defendant which the Supreme Court affirmed, holding "that plaintiff failed to establish *a prima facie* case of gross negligence, " saying f ailure to install protective devices or to post warnings for children at a platform edge . . . amounts, at the most, to ordinary negligence and a failure to exercise reasonable care." 362 S.E.2d at 691. There, the court defined gross negligence as "that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others Gross negligence amounts to the absence of slight diligence, or the want of even scant care.". (Citations omitted) 362 S.E.2d at 691.

VI.

The item marked at the July 20th hearing as "Plaintiffs, Exhibit I" for identification was not timely presented, or in accord with Rule 56 or the initial pretrial order, or the extension of time granted plaintiffs on July 17th within which to file affidavits or other evidence in opposition to defendants motion for summary judgment. See Lulan v. National Wildlife Fed., 497 U.S. 871, 110 S. Ct. 3177, 3192 (1990); Orsi v. Kirkwood, 999 F.2d 86, 91 (4th Cir. 1993). In addition, the statement of qualifications is not signed by anyone and the attachments thereto carry no signatures or authentications. In their present form, they would not be admissible in evidence at a trial. Nor would

the pamphlets or treatises attached would not be admissible as an exhibit. See Rules of Evidence, Rule 803(18). The same is true of a letter dated July 24, 1995, marked received July 24, 1995, and "marked for identification as P.-21, to which is attached pages from a deposition of Mark taken June 8, 1994, along with what appears to be two xerox copies of two photographs of the slide unit. However, the copies of said photos do not show the "O" (circle) and "XI' (cross) which marked the place Mark Jumped from and where he landed. A copy of the full deposition of Mark is also attached. However, a full copy of said deposition had already been filed by defendant as part of its motion for summary judgment. Hence, that, full deposition is already before the Court. Otherwise, since this copy of the deposition was not timely filed, it u-ould not be considered. But, the deposition having already been filed, it will be aiven full consideration. an made it clear the court "did not abuse its discretion in declining to admit" affidavits not timely f iled. 497 U.S. at 894, 110 S. Ct. at 3192. Too, in keeping with Lujan, the Fourth Circuit in Orsi affirmed the action of the trial court in refusing to consider documents offered on the day of the hearing "on the motion for summary judgment purposes because it found them to be untimely and unauthenticated." 999 F-2d at 91. But even if the two documents had been timely filed, it would not have affected the outcome of the motion for summary judgment.

VI.

Plaintiffs' complaint alleges defendant was guilty of gross negligence in that it (1) failed to provide a sliding board unit with proper safety features, including a protective guardrail to prevent children from falling; (2) failed to warn of the height, weight and age limitations for use of the proper soft material

surface in and about the slide area in the event of a fall; (3) failed to provide the requisite surface mandated by industry standards; and (4) failed to have any person in charge of the park and failed to correct defects in the equipment.

Most of the allegations are not allegations of facts, but conclusions. Even so, none of the allegations of any facts in the complaint reach the test of gross negligence. Even if the allegations reached the test for gross negligence, they are not supported by any evidence.

It is undisputed that the mother and friend who accompanied Mark to the park did not see Mark fall or jump at the time of his injury, nor do they know of their own knowledge what caused his injury. The only evidence of how and what caused Mark's injury is his own testimony.

As set out above, the first allegation of negligence alleged against the City is an alleged failure to provide a sliding board unit with proper safety features, including a protective guardrail to prevent a child from falling through and getting hurt. The day of or the day after the accident, one of Markts grandparents went to the park and took pictures of the slide. They were attached to Mark's or his mother's deposition. Except for the pictures, there is little description of the slide unit. There is no testimony or other evidence that the sliding board unit was defective or failed to meet any known safety standard. Neither Mark nor his mother complained of or testified there was any defect in the unit. The allegation of a failure to provide a unit with a protective guardrail to prevent a child from falling through is of no consequence, for Mark did not fall through any guardrail or from the slide unit. Nor is there evidence that the guardrail was defective. Mark crawled through the railing and

jumped.

The evidence establishes that the piece of equipment in question was purchased in 1987 by City from Larry Hasley and Associates (Hasley), manufactu'rer's representatives for Miracle Recreational Equipment Company (Miracle) . !-,'iracle was known to the City as a well known manufacturer of playground equipment. The equipment was furnished and installed by Miracle and Hasley. The City conducted a monthly inspection of all of said equipment, records filed with affidavits of those who conducted such inspections show an inspection of this piece of equipment in December 1990, and January, February and March of 1991, and the finding of no defects in it. City never designed, manufactured or installed said equipment, nor did it make any modifications to the equipment from date of purchase up to the date of the accident in issue, except to replenish some sand.

Here, there is no evidence of any improper or faulty design, manufacture or installation of the equipment or that it does not meet industry standards. Nor is there any evidence that it was in anyway dangerous for use by children.

Secondly, the allegation is that City failed to warn of the height, weight and age limitations for the use of the proper soft material surface in and around the slide. But, plaintiffs fail to show what the warning should be or what the height or age limit should be. The unit was a two slide unit for sliding, not for jumping. Mark's mother testified she did not go over to the slides with Mark on the day of the accident. Mark was four years old. Whether he could have read and understood any warning which might have been posted is a guess. But, his mother had observed the slide unit on prior occasions when she

and Mark went to the park. She said Mark had been to the park several times before and played on the same slides. Her idea of what a warning sign should have been was "play at your own risk, park is not responsible for upkeep of equipment." (Dep. of Carol, February 2, 1994, p. 20). Further, she said there should be a sign saying children under a certain height or a certain age shouldn't be allowed to play on equipment that is too tall for them. But no one has ever told her the equipment at the park was too high for Mark's age. Continuing, she testified "[I] had no reason to believe that it was too high. It was supposedly completely enclosed so that the portion that was seven feet from the ground, could not, you could not fall from it because it was enclosed." (Dep. of Carol February 2, 1994, p. 21). Carol marked on a photo of the unit the point where Mark told her he fell or jumped from with an "Off and where he landed with an "X".

Since there is no evidence of any danger to a fou r year old or that the unit was not suitable, there was no reason to post any warning.

Without challenge, the evidence establishes the City had never had a report of an injury by a child or any person falling or jumping off of the slide unit, or of any kind of injury or any complaint that the slide was too high, or of any failure to properly maintain or care for the slide. Such was not limited to this particular unit, but it applies to all other similar units in the parks operated by the City. No evidence has been presented to even suggest that said unit bears any defect or fails to meet safety standards applicable to such equipment for use in City parks.

In his deposition of June 8, 1994, Mark testified he had never

been to Locke Park before the date of the accident, March 24, 1991.2 He was 7 years old at the time of his deposition and 4 years old at the time of his accident. He testified his mother told him to play on the equipment he was playing on. He marked on one of the photographs with an "O" the point he fell or Jumped from and an "X" where he landed. He pointed to the "O" and said he jumped off there. When asked how he got to the place where he jumped from, he said:

A. There was a little hole there with - with a piece right here and partway from it and one little thing here. When I squeezed through I got to get on the other side of the bridge when I went over this way, then I went back and all of a sudden I couldn't sqixee'ze 'through there", so I jumped down. (Mark's Dep. June 8, 1994, p. 13)

He said he climbed through the horizontal bars where he placed the circle, but later said they were the vertical bars - the ones that go up and down. He described his actions, saying:

A. I was climbing on the outside, but I was trying to get in and I couldn't, so I went back. I was trying to get in, but then I couldn't get through that either.

Q. Okay. Then what did you do?

Neither Mark nor any other person ever mentioned there was any foreign material on the slide or platform or any defect, except some sand on the steps. Nor has anyone suggested any defect on anything that had any part to play in the reason for his Jamp. Nor did he mention any part of the equipment was broken or defective, or that there were any loose boards or any

other defect in the unit. Mark had been to Locke Park several times before and played on the slides. Carol had observed the height of the slides before the date of the accident and saw nothing wrong with the slides.

Thirdly, plaintiffs assert, without any evidence to support the assertion, that City failed to provide a surface mandated by industry standards. At this point, the only evidence of what surface is mandated is that sand is the proper surface. Sand was installed with the unit in 1987, and has been replenished from time to time by the City. There is no evidence of the depth of the sand on the date of the accident, or what depth the industry requires or recommends. Mark said when he jumped, he landed on his stomach.

His mother testified he had been there several times before.

(Dep. of Mark June 8, 1994-, p. 22-23).

Lastly, plaintiffs allege in paragraph 7 of the complaint that defendant failed to have any person in charge of the park and failed to correct the defects of the equipment. Since plaintiff has not presented any evidence to establish any defects in the equipment, these assertions establish nothing. The affidavits and daily records of the City establish that there were City employees in charge of the park and its maintenance and that there were no known defects. Even if the plaintiffs had presented evidence to establish the alleged defects, such would only establish simple negligence, but certainly not gross negligence.

There is absolutely no evidence of negligence on the part of

City. It had periodic inspections made of the equipment in the park. It had purchased the equipment from a reputable manufacturer. The record is totally void of any evidence that could be said to show "an absence of slight diligence,,, or "want of scant care," or "an utter disregard of prudence" or "an indifference to others" or a "complete neglect of the safety of the guest."

What the court said in Kendricks in affirming the action of the trial court in setting aside the jury verdict and entering judgment for defendant is particularly applicable here, i.e., "to find that [an unsafe condition] did exist would involve the rankest of speculation based on the evidence." 421 S.E.2d at 450. Continuing, it said "neither the aggregate of Kendricks, testimony, nor any other evidence adduced at trial, provided the jury with a basis for anything more than conjecture regarding whether an unsafe condition existed in the ground surface around and underneath the merry-go-round." 421 S.E.2d at 450.

There being no dispute of any material fact necessary to establish any right of plaintiffs to recover damages in the case, the defendant's motion for summary judgment is GRANTED and this action is DISMISSED.

Copy of this Opinion and order is forwarded to counsel.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
July 28TH, 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTIUCT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, an infant who sues by his mother as next friend CAROL A. JAMELL,
and

CAROL A. JAMELL, individually,

Plaintiffs,

v. Civil action No: _____
JURY TRIAL DEMANDED

CITY OF CHESAPEAKE,
A Municipal Corporation

Serve: Honorable William E. Ward
Chesapeake City Mayor
306 Cedar Road
Chesapeake, Virginia 23320

Defendant.

COMPLAINT

COME NOW the Plaintiffs and move the Court for judgments against the Defendant as follows:

1. That the Plaintiff is the maternal parent of Mark Jamell, an infant and to whom custody has been awarded.

2. Plaintiff and her son are citizens and residents of the state of New Mexico, with a fracture of the leg with a possibility of a shortening, and a permanent injury, physically and mentally, requiring medical, hospital, loss of services, together with incurrence of future expenditures for the infant child, all of which are in excess of $50,000.00.

3. That on March 24, 1991, the defendant, a municipal corporation, had before and on this date owned and operated a recreational park known as Locke Park in the City of Chesapeake for infants, for the most part, and for others.

4. Locke Park contains playground equipment and a sliding board/jungle gym apparatus.

5. The Defendant was grossly negligent and among other items of gross negligence was particularly gross negligent in the following manner:

A. Defendant failed to provide a sliding board unit with proper safety features, including, but not limited to a protective guardrail, to prevent a child from falling through and/or getting off of them.

B.Defendant failed to notify and wam upon entrance, the Plaintiff, and others of the height, weight and age limitations for the use of the proper soft material surface in and about the sliding area in the event of a fall.

C. Defendant failed to provide the requisite surface mandated by industry standards.

6. Plaintiff, Mark Jamell, a child of four years of age, states that the Defendant failed to provide the necessary and proper care and attention to the sliding board unit and therefore was grossly negligent.

7. That on or about March 24, 1991, the defendant failed to have any person in charge of the park, and the defendant failed to correct the defects in said equipment.

8. That the omissions and commissions of conduct constitute gross negligence as defmed in Virginia Code § 1 5.1-291 which conduct was wanton, willful, reckless and a disregard of the great duty owed, especially to infants.

9. Mark Jamell, did get on the sliding board owned and operated by the defendant, and he was unaware of the condition of the sliding board, the gross negligence of the defendant set-out in the counts of this Complaint, caused plaintiff to fall violently to.the ground and to sustain a fracture and permanently injure his leg, together with other physical and mental ailments.

10. That as a direct and proximate result of the gross negligence of the defendant, the undersigned plaintiff, Carol

Jamell, was caused to incur and expend monies for treatment, doctors, drugs, hospitalization tnd will in the future incur medical and other expenditures in behalf of the said infant.

11. That in addition to the expenditures and money, the plaintiff had to withdraw from her employment to take care of the infant child and therefore lost her earning capacity during said period of time.

12. That the plaintiff has lost the service of minor child and will in the future lose the services of the minor child.

13. The plaintiffs demands a jury trial.

13A. Punitive damages of $250,000.00 to be awarded to the infant child, Mark Jamell, and $250,000.00 for compensatory damages for the infant child, Mark Jarnell.

13B. Punitive damages for mother, as next friend of $50,000.00 and $50,000.00 as compensatory damages for mother as next friend.

WHEREFORE, Plaintiffs pray for judgment against the defendant in the sum of Five Hundred Thousand Dollars ($500,000.00) for infant Plaintiff, Mark Jamell, and for One Hundred 'Thousand Dollars ($100,000.00) for Plaintiff, Carol Jamell, plus costs and interest from March 21, 1991, for compensatory and punitive damages.

MARK JAMELL, an infant who
sues by his mother and next friend
CAROL A. JAMELL

AND
CAROL A. JAMELL

LOUIS B. FINE
Fine, Fine, Legum & Fine, P.A., p.q.
601 Pavilion Center
2101 Parks Avenue
Virginia Beach, Virginia 23451
(804)422-1678
(804)422-0865 (Telecopier)
State of New Mexico
City of Alberquerque, to-wit:

Subscribed and sworn to before me this 21st day of December, 1994.

My commission expires:

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, an infant who
sues by his mother as next friend
CAROL A. JAMELL,

and CIVIL ACTION NO. 2:95cv249

CAROL A. JAMELL, individually,

Plaintiffs,

v.

CITY OF CHESAPEAKE,
A Municipal Corporation,

Defendant.

MOTION TO DISMISS

COMES NOW the Defendant, City of Chesapeake, by counsel, and moves this Court for the entry of an Order dismissing this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, upon the following grounds:

1. The Complaint fails to state a cause of action against this Defendant rising to the level of "gross negligence" as required under Tide 15.1-291 of the Code of Virginia of 1950, as amended, as a matter of law.

2. The Complaint, on its face, fails to state a cause of action entitling the Plaintiff to the recovery of punitive damages, as a matter of law, on the following grounds:

a. Punitive damages are not recoverable against the municipality in the Commonwealth of Virginia, as a matter of law.

b. The City of Chesapeake is a municipal corporate body politic, and is immune from liability beyond that specifically authorized by the General Assembly of the Commonwealth of Virginia, as outlined in Title 15.1-29 of the Code of Virginia of 1950, as amended.

c. The award of punitive damages against a municipality is contrary to the public policy of Virginia.

WHEREFORE, the Defendant, City of Chesapeake, prays that the Complaint, including all claims for compensatory damages and all claims for punitive damages, be dismissed,that judgment be entered on its behalf, and that it recover its costs, expenses and attorneys' fees herein expended.

CITY OF CHESAPEAKE

By_____
Of Counsel

T. Jeffrey Salb

Virginia Bar Code No. 16091
Breeden, MacMillan & Green, P.L.C.
1700 First Virginia Tower
555 Main Street
Norfolk, Virginia 23510
(804) 622-1111

CERTIFICATE

I hereby certify that on this day of May, 1995, a true copy of the foregoing Motion to Dismiss was mailed to Mr. Louis B. Fine, Fine, Fine, Legum & Fine, P.A., 601 Pavilion Center, 2101 Parks Avenue, Virginia Beach, Virginia, 23451.

_____

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Mark Jamell, an infant who sues by his mother as next friend Carol A. Jamell, and Carol A. Jamell, individually,

Plaintiffs,

v. Civil Action No. 2:95cv249

City of Chesapeake,

Defendants.

ORDER ON INITIAL PRETRIAL CONFERENCE

It is ORDERED that the provisions of Fed. R. Civ. P. 30 (a) (2) (C) (oral depositions), 31 (a) (2) (C) (depositions by written questions), 33 (a) (written interrogatories), 34 (b) (requests for production and entry) and 36(a) (requests for admission) that a party may not serve such discovery before the time specified in Fed.R.Civ.P. 26(d) will not apply in this case.

The provisions of Fed.R.Civ.P. 26(a) (1) (that a party shall provide certain initial disclosures without awaiting a discovery request), 26(d) (that a party may not seek discovery from any source before the parties have met and conferred as required by Fed R.Civ.P. 26 (f), 26 (f) (that the parties meet and plan for discovery prior to a scheduling conference), 30 (a) (2) (A) (that a party must obtain leave of court to take more than ten

depositions), 32(a)(3) (that a deposition taken without leave of court pursuant to a notice under Rule 30 (a) (2) (C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the depositions) and 33 (a) (that limits the number of written interrogatories to 25 in number including all discrete subparts), will not apply in this case.

Subject to any special appearance, questions of jurisdiction, or other motions now pending, the parties having advised the Court that certain processes of discovery are contemplated, it is

ORDERED that the parties do propound interrogatories (Rule 33) and/or written questions (Rule 31), file requests for production of documents and things (Rule 34) and/or admission (Rule 36) and/or physical and mental examination (Rule 35), issue subpoenas for discovery (Rule 45), and take discovery and/or **de bene ease** depositions of witnesses and/or parties (Rules 26, 28, 30) in accordance with the following schedule. Interrogatories to any party shall be limited to thirty (30) and discovery depositions of nonparties shall be limited to five (5) (Local Rule ll.l(A) and

The Court reserves the right to permit discovery depositions of a party or witness who is a nonresident, or otherwise unavailable, at any time prior to trial but such permission must be granted by order of court either by agreement of counsel or upon hearing.

Trial shall commence on **December 4, 1995, at 10:00 a.m., at Norfolk.**

Trial by jury has been demanded. Proposed voir dire and written jury instructions shall be received by the Clerk on or before **November 27, 1995.**

A final pretrial conference shall be conducted on **November 9, 1995, at 9:00** a.m., at which time trial counsel shall appear prepared to present for entry an order setting forth (1) a stipulation of undisputed facts, (2) agreed upon exhibits and discovery material to be introduced, (3) exhibits and discovery material intended to be introduced by each party to which there are objections, stating the particular grounds for each objection, (4) the names and addresses of all witnesses who will testify on behalf of each party, and the purpose of such testimony, (5) the factual contentions of each party, and (6) the triable issues as contended by each party. With the exception of rebuttal, any witness, exhibit or discovery material not included in the final pretrial conference order will not be permitted at trial.

Pursuant to the provisions of Local Rule 12 (D), an **attorneys, conference** is scheduled in the office of counsel for plaintiff on **October 26, 1995, at 2:00 P.m.** Counsel shall appear in person for the purpose of preparing stipulations and exchanging information to be included in the final pretrial order outlined above, and for undertaking the **Pretrial Disclosure** required by Rule 26 (a) (3) , Fed.R.Civ.P., and any objections to the matters disclosed and the grounds therefore shall be noted at this conference. The disclosures, objections and the grounds therefore shall be included in the proposed final pretrial order. While preparation of the final pretrial order shall be the responsibility of all counsel, counsel for plaintiff shall distribute a final draft to all other counsel at least two business days before the scheduled final pretrial conference. Disagreements concerning the content of the final draft shall be resolved before

counsels appearance at the final pretrial conference, at which time the Court will expect the presentation of a clean final draft. Failure to comply may result in the imposition of sanctions pursuant to Rule 16 (f) , Federal Rules of Civil Procedure.

All **de bene esse** depositions shall be concluded on or before **October 12, 1995.**

If military personnel or out-of-state persons are involved as parties and/or witnesses, counsel shall proceed forthwith to take the discovery and/or de bene esse depositions of said parties and/or witnesses.

Discovery shall be commenced forthwith and shall be completed by **plaintiff (s)** on or before **August 28, 1995;** by **defendant(s)** on or before **September 28, 1995.** "Completed" means that interrogatories, motions for production, and other motions touching discovery must be served at least thirty (30) days prior to the established cutoff date so that responses thereto will be due on or before the cut-off date. All subpoenas issued for discovery must be returnable on or before the discovery cut-off date. Depositions upon oral examination and/or written questions, interrogatories, requests for documents, requests for admissions, and objections, answers and responses thereto, **shall not be filed** with the Court unless the Court, on its own initiative or upon motion of a party for good cause shown, requires the filing of all or part of the discovery material obtained during the course of this litigation. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

TIMES AND SEQUENCE FOR DISCLOSURE OF

EXPERT TESTIMONY:

1. Any party may serve a Request For Disclosure Of Expert Testimony seeking the information specified by Rule 26 (a) (2) (A) and (B) Fed. R. Civ. P. on or af ter the date when such party is authorized to initiate any other form of discovery under the Fed.R.Civ.P. as modified by the Local Rules of this Court, so long as the request is served more than thirty (30) days prior to the date of Mandatory Disclosure.

2. Upon receipt of a Request For Disclosure of Expert Testimony, a party shall respond with the information specified in Rule 26(a) (2) (A) and (B) Fed. R.Civ.P. within thirty (30) days of the receipt of such request.

3. Upon receipt of the Response To Request For Disclosure of Expert Testomony, all parties receiving such disclosure shall serve their contradictory or rebuttal evidence, also containing the information specified by Rule 26 (a) (2) (B) Fed.R.Civ.P., within thirty (30) days after the initial disclosure by any other party or on **September 12, 1995,** whichever date first occurs.

4. Mandatory Disclosure. In the event that disclosure is not sooner required, all parties shall simultaneously disclose the inf ormation specif ied in Rule 26 (a) (2) (A) and (B) Fed. R. Civ. P. not later than **August 28, 1995.**

5. If not previously disclosed, all parties shall simultaneously disclose their contradictory or rebuttal evidence, specified in Rule 26(a)(2)(B) Fed.R.Civ.P., to any other parties' initial disclosure of expert testimony not later than **September 12, 1995.**

6. **All** parties shall complete all forms of discovery with respect to expert testimony not later than **October 12, 1995.**

7. Answers to interrogatories directed at clarification of the written reports of expert witnesses specified by Rule 26(a)(2)(B) Fed.R.Civ.P. shall be due in fifteen (15) days.

The court notes pending motions to dismiss and quash. Plaintiffs, reply with respect to motion to quash shall be received by the Clerk on or before July 7, 1995. Oral argument on these motions is scheduled on July 17, 1995, at 2:00 p.m.

_____
UNITED STATES
MAGISTRATE JUDGE

Date: June 22, 1995

APPENDIX F

COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH, to-wit:

This day personally appeared befpre me, H. R. SCHIPPEL, the undersigned, who, after being first duly sworn, deposes and says as follows:

That he is a resident of the City of Norfolk and has resided in this area for a period in excess of fifty (50) years and by occupation he is a professional engineer, certified by the Commonwealth of Virginia, with a bachelor of science degree and an aeronautical degree; that he was employed by NASA as a space scientist for thirteen (13) years; that he qualified as an expert in the Circuit courts of the City of Norfolk, Virginia Beach, Portsmouth and Suffolk, and testified in behalf of a number of litigants; that he served on the Safety Committee for the City of Chesapeake, and is particularly familiar with the premises and the equipment at the Great Bridge Loch Playground, and has visited there; that he has read the testimony heretofore given by architect Dan E. Griffin and does, in fact, corroborate the testimony heretofore given by Dan E. Griffin. Moreover, that he has read the Complaint filed in the United States Federal Court for the Eastern District of Virginia, and is definitely of the opinion that the allegations set forth in the Complaint are applicable to the situation as claimed in said Complaint.

Moreover, the Defendant was grossly negligent in permitting the sliding board and the equipment to be used because the openings wherein the child fell should not have been as large

under any of the circumstances as had been used by the Defendant.

Additionally, the area should have been inspected more often in connection with proper soft landing.

WITNESS my hand and seal this 18th day of July, 1995.

_____(SEAL)
H. R. Schippell

Subscribed and sworm to before me, the undersigned Notary Public, this 18th day of July 1995.

_____
Notary Public

My commission expires August 31, 1995.

APPENDIX G

COMMONWEALTH OF VIRGINIA,

CITY OF PORTSMOUTH, to-wit:

This day personally appeared before me, DAN E. GRIFFIN, the undersigned, who, after being first duly sworn, deposes and says as follows:

That he is an architect duly qualified and licensed in the Commonwealth of Virginia, and has been recognized as an expert in the Circuit Courts of the Cities of Portsmouth, Norfolk, Suffolk, Newport News, Virginia Beach, and the Federal District Court; that he viewed the premises and the playground equipment involved, which is a subject of the litigation; that he testified under oath and was examined as to his qualifications by the same counsel now involved in this case; that he testified as to the deficiencies in discovery proceedings, a copy of the transcript is attached herewith.

That he confirms and corroborates that the said testimony was true and is true and correct.

WITNESS my hand and seal this 18th day of July, 1995.

_____(SEAL)
Dan E. Griffin

Subscribed and sworn to before me, the undersigned Notary

Public, this 18th day of July, 1995.

_____

Notary Public

My commission expires:

Supreme Court, U.S.
FILED
OCT 21 1996

(2)

No. 96-488

In The

Supreme Court of the United States

October Term, 1996

MARK JAMELL, an infant who sues by his mother and next friend CAROL A. JAMELL, and CAROL A. JAMELL, individually,

Petitioners,

v.

CITY OF CHESAPEAKE, a municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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47 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CITATIONS OF OPINION BELOW 1

STATEMENT OF FACTS AND OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. This Case Does Not Present Matters of Interest to the Supreme Court. 7

II. The District Court Properly Granted Defendant's Motion for Summary Judgment 8

A. No Further Discovery Was Necessary 9

B. The Plaintiffs Failed to Show Specific Facts to Present a Genuine Issue of Gross Negligence 11

III. The Court of Appeals did not abuse its Discretion in not Considering the Plaintiffs' Untimely Affidavits 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES CITED:

Atkinson v. Bass, 579 F.2d 865 (4th Cir.), cert. denied, 113 S. Ct. 1415 (1993) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12

Catawba Indian Tribe v. State of South Carolina, 978 F.2d 1334 (4th Cir. 1992), cert. denied, 113 S. Ct. 1415 (1993) 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 13

Doerr v. Barnes, Adm'r, 198 Va. 306, 94 S.E.2d 271 (1956) 14

First Chicago International v. United Exchange Co., Ltd., et al., 836 F.2d 1375 (D.C. Cir. 1988) 10

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct 1575 (1968) 12

Hershman v. Payne, 196 Va. 241, 83 S.E.2d 418 (1954) 14

Lujan v. National Wildlife Fed., 497 U.S. 871 (1990) 15

Meagher v. Johnson, 239 Va. 380, 389 S.E.2d 310 (1990) 13

Mitchell v. Wilkerson, 193 Va. 121, 67 S.E.2d 912 (1951) 14

RGI v. Unified Industries, Inc., 963 F.2d 658 (4th Cir. 1992) 16

Sutera v. Schering Corp., 73 F.3d 13 (2d Cir. 1995) 10

Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506 (2d Cir. 1989) 10, 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES CITED:

Federal Rule of Civil Procedure 12 9
Federal Rule of Civil Procedure 12(b)(6) ... 4, 6, 8, 9, 11
Federal Rule of Civil Procedure 56 .... 5, 6, 8, 9, 11, 13
Federal Rule of Civil Procedure 56(b) 9
Federal Rule of Civil Procedure 56(e) 9, 12
Federal Rule of Civil Procedure 56(f) 10
U.S. Supreme Court Rule 10 7
Virginia Code § 15.1-291 4
Virginia Code § 8.01-420 13

OTHER AUTHORITIES CITED:

6 James Wm. Moore et al., Moore's Federal Practice, ¶ 56.22[1],[2] (2d ed. 1988 & Supp. 1992-93) 12

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that the Court deny the Plaintiffs' Petition seeking review of an Opinion of the United States Court of Appeals for the Fourth Circuit.

CITATIONS OF OPINION BELOW

The Petitioners correctly list two of the opinions and judgments by the courts below but omitted the following:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, et als,

Plaintiff,

v. CIVIL ACTION NO. 2:95cv249

CITY OF CHESAPEAKE,

Defendant.

Opinion and Order
Issued August 4, 1995.

STATEMENT OF FACTS AND OF THE CASE

The Defendant notes certain inaccuracies and omissions from the Plaintiffs' statement of the case and facts, and so offers the following summary.

The incident referred to in the Complaint allegedly occurred on or about March 24, 1991. The infant Plaintiff,

Mark Jamell, was playing in a municipally owned and operated recreational facility known as the Great Bridge Locke Park in the City of Chesapeake, Virginia. The Complaint alleges that Mark Jamell was injured while playing on a piece of playground equipment located in the park.

The present action is a successor to two consolidated lawsuits previously filed in the Circuit Court for the City of Chesapeake, Virginia bearing the styles: *Mark Jamell, an infant who sues by his mother, Carol A. Jamell, as next friend v. City of Chesapeake,* Docket No. L-26337-M, and *Carol Jamell, Individually v. City of Chesapeake,* Docket No. L-26340-M. Those cases were nonsuited (voluntarily dismissed without prejudice) on January 13, 1995 shortly before trial, but after discovery had been completed. The cases were refiled in the United States District Court on March 13, 1995, based upon diversity jurisdiction. Counsel agreed the discovery taken in the prior state court proceeding could be used in the federal action. Several of the depositions taken in the state cases were filed by the Defendant and made a part of the record in the district court.

The Defendant's Motion to Dismiss in the present action was filed on May 26, 1995, and the depositions of Carol Jamell and Mark Jamell, an infant, were attached. That of Carol Jamell, mother of Mark Jamell, establishes that on the date in question, Mrs. Jamell took her 4-year old son to the park to play. She was accompanied by a friend whose current address and whereabouts were unknown. C. Jamell Tr. p. 7. Mark was permitted to play on the equipment while Mrs. Jamell and her friend read the newspaper on a park bench. C. Jamell Tr. p. 9. Approximately one-half hour later, a man carried Mark

over to her. Mark was crying and screaming, had a bloody nose, and said his knee hurt. She took Mark straight to her car to seek medical attention. C. Jamell Tr. pp. 10-11. Mrs. Jamell did not see Mark fall, does not have any personal knowledge about where he was located immediately prior to his injury, and has no direct personal information regarding the mechanics of the fall. While there may have been eyewitnesses to the incident, Mrs. Jamell was unable to identify by name or address any witness other than her son. To the best of her knowledge, information and belief, the only person who knows where and how Mark was injured is Mark himself. C. Jamell Tr. pp. 11-12. Through interrogatories, Mark marked a copy of a photograph of the location where he was injured. An X indicated the area where he claims to have been injured, and this exhibit is attached to the Mark Jamell deposition transcript, part of the record in the district court.

Mark's deposition was taken on June 8, 1994. On that date, he was seven years old. He testified that he was injured after squeezing through the bars to the outside of a "bridge" in the playground equipment. He went up toward the slide, returned, and couldn't squeeze back through, so jumped down. M. Jamell Tr., p. 7, pp. 11-19. There was no evidence that anything made him trip, (M. Jamell Tr., p. 22); nor was there any suggestion that any part of the playground equipment was broken. The photographs produced by the Plaintiffs in response to requests for production of documents and used at the deposition show that the area in which the equipment

was located was surfaced with sand, and that the platforms or "bridges" referred to by Mark were equipped with railings.

This action is governed by § 15.1-291 of the Code of Virginia of 1950, as amended, which limits the liability of cities and towns in the operation of recreational facilities to damages resulting from the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility. The Complaint filed in the U.S. District Court for the Eastern District of Virginia sought damages from the City allegedly as the result of its gross negligence in the design, maintenance and operation of this city park.

The City's motion strove to dismiss all claims upon grounds that the Complaint failed to state a cause of action against it for gross negligence as required under § 15.1-291 of the Code of Virginia of 1950, as amended, as a matter of law, and to dismiss all claims for punitive damages also under Rule 12(b)(6). Attached to the motion and supporting memorandum were the following: 1. Deposition transcript of Carol A. Jamell; 2. Deposition transcript of Mark Jamell, an infant, with exhibits; 3. Affidavit of Barbara O. Olfers, crew supervisor for the Chesapeake Department of Parks, Recreation and Maintenance, with exhibits attached; 4. Affidavit of J. Pat Kallaher, Superintendent of Buildings and Grounds for the City of Chesapeake, with exhibit attached; 5. Affidavit of Patricia L. Mellon, Chesapeake's Liability Claims Specialist. To supplement this material, on or about July 14, 1995, two additional affidavits were submitted of J. Pat Kallaher and Sharon Kline, Fiscal Administrator for the

Chesapeake Department of Parks, Recreation and Building Maintenance. These further authenticated certain records which had been attached as exhibits to the previously filed affidavits.

In response to these documents, Plaintiffs filed various motions but no affidavits, deposition transcripts or other exhibits. By way of response, the City advised the Court and Plaintiffs that it wished the affidavits and other submissions to be considered pursuant to Federal Rule of Civil Procedure 56, as the City did not believe there existed a genuine issue of material fact.

At the Initial Pre-Trial Conference on June 22, 1995, a hearing was scheduled on the City's motions. This hearing was set by agreement for July 17, 1995. At the hearing, counsel for Plaintiffs sought additional time to respond to the Motion to Dismiss. No objection was raised by Defendant, and Plaintiffs were granted leave to file additional responses on or before July 7, 1995.

On or about July 6, 1995, Plaintiffs filed a "Supplemental Answer to Motion to Dismiss." No affidavits, deposition transcripts or other exhibits were attached or referenced. Realizing that Plaintiffs apparently intended to rely upon their pleadings alone, the Defendant filed a "Reply" and specified that the City sought to have its Motion to Dismiss treated as a motion for summary judgment under Rule 56; candidly outlining the ramifications of its motion, the exhibits, and affidavits.

At the July 17, 1995 hearing, counsel for the Plaintiffs sought additional time to submit affidavits and other

documentation. The Court, in the exercise of its discretion, granted the Plaintiffs this additional time. By mutual agreement, the hearing was re-set for July 20, 1995.

No affidavits, depositions or other documentation were filed by the plaintiffs prior to the second hearing. The hearing took place before the Honorable Richard Kellam, Judge, as scheduled. The judge took the matter under advisement.

On July 28, 1995, the district court granted the Defendant's Motions to Dismiss and for Summary Judgment pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

In their Petition, the Plaintiffs erroneously state that they submitted two affidavits at the second hearing. Petition pp. 2-3. Instead, counsel for the Plaintiffs proffered an unsigned statement of the qualifications of Dan Griffin with some supporting documents. The court held these to be inadmissible, and specifically stated that it never received any affidavits prior to rendering its decision. See App. at 4. The court also received a letter with attached pages from the deposition of Mark and some photos. The court stated that even if these documents had been timely filed, they would not have affected the outcome of the motion for summary judgment. *Id.* at 17.

The Plaintiffs did submit affidavits after the hearing and decision, and these were received by the district court on August 2, 1995. See App. at 24. However, these referred to materials which were not attached and were never provided to the court for its consideration. *Id.* at 24-6. The district court ruled that these affidavits were untimely and, even if considered, would not change the

result because they established "little or nothing." *Id.* at 26.

On appeal, the fourth circuit affirmed the lower court. In footnote 2 of the opinion, it noted that it agreed that the affidavits submitted after the summary judgment had been awarded were untimely. It therefore did not consider them. The opinion does not state whether the court considered the two materials received prior to the July 28 decision. See Petitioners' App. at 4 n. 2.

The Defendant notes that the various documents retyped by the Plaintiffs and included in the appendix to their brief contain numerous typographical errors and omissions. Along with other errors, one entire page of the district court's opinion of July 28, 1995, was inadvertently omitted, and the Defendant has therefore provided a complete copy of the order in its Appendix. Also included is the district court order of August 4, 1995.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT MATTERS OF INTEREST TO THE SUPREME COURT.

Compelling reasons do not exist for the Court to grant review on certiorari in this case. The Plaintiffs do not allege that this case involves a conflict between the circuits, decides a federal question, or departs from the usual course of judicial proceedings. See U.S. Sup. Ct. R. 10. At the root of this case are questions involving the interpretation of state law – i.e. whether the facts as alleged constitute gross negligence and rise to the level of

punitive damages. In essence, the Plaintiffs ask that this Court: 1. Reweigh the evidence considered by the court of appeals and the district court to determine if those courts erred in granting summary judgment for the Defendant; and 2. Reconsider evidence that those courts determined was untimely and that the district judge held would not have assisted the Plaintiffs in any event. This case was properly considered by the lower courts and does not present issues of a nature to compel the attention of the highest court of the United States.

II. THE DISTRICT COURT PROPERLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant moved to dismiss the Plaintiffs' complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Under that rule, if the Defendant attaches supporting affidavits and other documents, the motion is converted into one for summary judgment to be disposed of pursuant to Rule 56. The motion must be served at least 10 days before the hearing, and the adverse party must serve any opposing affidavits prior to the day of the hearing. Judgment is to be rendered for the moving party if the supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Any affidavits are to be based on personal knowledge, set forth such facts as would be admissible in evidence, and should show that the affiant is competent to testify to the matters stated in the affidavit. All papers referred to in the affidavit should be attached. When a motion for summary judgment is

made and supported under Rule 56(e), the adverse party may not rest upon the mere allegations or denials of their pleading, but must set forth specific facts by affidavits or otherwise, showing that there is a genuine issue for trial. F.R.C.P. 56.

A. NO FURTHER DISCOVERY WAS NECESSARY

The Plaintiffs allege that the district court did not give them sufficient time to conduct discovery before ruling on the Motion to Dismiss. Rule 12 provides that a 12(b)(6) motion may be heard before trial, upon the request of any party. Timing is also addressed in Rule 56, stating that a defending party may move for summary judgment at any time. Rule 56(b). By the time the Defendant filed its motion in the present case, the parties had already fully participated with discovery in the state court proceeding and this was made applicable to the federal court action by agreement of counsel. The parties had propounded and responded to interrogatories, requests for production of documents, and requests for admissions. The Plaintiffs had even been granted permission to file more than the allowed number of interrogatories. Numerous individuals had been deposed, including Mark and Carol Jamell, City of Chesapeake personnel, and the Plaintiff's expert, Dan E. Griffin.

At the two hearings on the defendant's Motion to Dismiss, the Plaintiffs never even hinted that further discovery was necessary. Although the case had been pending for some time in federal court, they had not propounded any discovery of any nature. For the first time, they now suggest that the district court somehow

acted improperly by granting summary judgment early in the proceedings, before the time for conducting discovery pursuant to the pretrial order had run. However, they do not state what further discovery they would have conducted or why it was necessary, nor did they move for discovery under Rule 56(f) or allege that they have been prejudiced by the lack of it. The Defendant respectfully suggests that this new objection that the district court somehow denied them discovery is untimely and unfounded.

The cases cited in support of Plaintiffs' contentions are not helpful to them. For example, in *First Chicago International v. United Exchange Co., Ltd., et al.*, the court of appeals held that the district court erred in granting summary judgment before discovery was complete because 1. the district court erroneously assumed the plaintiff had waived further discovery; 2. very little discovery had been completed; and 3. the plaintiff's discovery requests to defendants were outstanding. 836 F.2d 1375, 1379-80 (D.C. Cir. 1988). See also *Sutera v. Schering Corp.*, 73 F.3d 13 (2d Cir. 1995) (plaintiff had not conducted *any* discovery in ADEA case prior to judge granting summary judgment, causing court of appeals to reverse). In the present case, full discovery had been completed in the state court and the plaintiffs had not shown any interest in conducting further discovery in federal court.

In *Trebor Sportswear Co. v. The Limited Stores, Inc.*, 865 F.2d 506 (2d Cir. 1989), the court recognized that a trial court "may properly deny further discovery if the nonmoving party has had a fully adequate opportunity for discovery." *Trebor*, at 511. Because the plaintiffs in that

case had plenty of time to conduct discovery and offered no persuasive proof that discovery would lead to the necessary admissible evidence, the court held that summary judgment was properly granted. *Id.* at 512. In the present case, the Plaintiffs had a fully adequate opportunity to conduct discovery in the state court proceeding and never suggested that they desired the opportunity for further discovery in federal court.

B. THE PLAINTIFFS FAILED TO SHOW SPECIFIC FACTS TO PRESENT A GENUINE ISSUE OF GROSS NEGLIGENCE

The Defendant filed its Motion to Dismiss and attached affidavits, exhibits and depositions in support, converting it into a motion for summary judgment. The Plaintiffs were given more than the requisite ten days notice of the hearing on the motion and were repeatedly warned of the conversion to a motion for summary judgment. In the initial pretrial order entered June 22, 1995, the district court noted pending motions to quash and to dismiss, ordered that Plaintiffs reply to the motions by July 7, 1995, and set a hearing on the motions for July 17, 1995. On July 10, counsel for the Defendant sent a notice to opposing counsel reminding him of the date for the hearing and specifying that the motion was brought pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56. By the time of the hearing, the Plaintiffs had not submitted any supporting affidavits. They moved for a continuance and asserted they would file such affidavits as necessary. The court agreed to this, and the hearing was rescheduled by agreement for July 20th. By the second hearing, the court and clerk had still not received the

affidavits. See App. at 4. Some time after the judge had entered summary judgment in favor of the Defendant, the Plaintiffs then submitted further documentation. The district court decided this was incomplete, untimely, and unhelpful. App. at 24-6. On appeal, the circuit court simply agreed the materials were untimely and did not consider them. Petitioners' App. at 4 n. 2.

In the present case, the Plaintiffs simply failed to establish that a material issue of fact existed, despite being given ample opportunity to do so. Once a motion for summary judgment is properly made and supported, the non-moving party must produce specific facts showing there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the moving party produces an affidavit stating "sufficient facts to sustain a motion for summary judgment in his favor, the burden [shifts to the opposing party] to establish that there is a 'material issue of fact.' " *Catawba Indian Tribe v. State of South Carolina*, 978 F.2d 1334, 1341 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993); *6 James Wm. Moore et al., Moore's Federal Practice*, ¶ 56.22[1],[2] (2d ed. 1988 & Supp. 1992-93). A party "must demonstrate that a triable issue of fact exists. They may not rest upon mere allegations or denials." *Anderson*, 477 U.S. at 255. See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592-93 (1968). As the court pointed out in *Atkinson v. Bass*, 579 F.2d 865, 866 (4th Cir.), *cert. denied*, 113 S. Ct. 1415 (1993), when a defendant filed a motion for summary judgment, "*positive* action was demanded of plaintiff. F.R. Civ. P. 56(e) explicitly admonishes that he could not then simply 'rest' on his complaint – that he 'must' affirmatively respond." The Supreme Court has held that

the moving party is entitled to summary judgment under Rule 56 "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the present case, the Plaintiffs failed to demonstrate that a triable issue of fact existed. First, the Plaintiffs failed to allege facts, which, if proven, would rise to the gross negligence necessary for recovery against the City. Gross negligence is that degree of negligence which shows indifference to others as constitutes utter disregard of prudence amounting to the complete neglect of the safety of another. *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310 (1990). The Plaintiffs' allegation that the park was negligently designed was refuted by the City's evidence that it did not design the equipment; their allegation that the park was negligently maintained was refuted by the City's evidence of its regular maintenance; and their allegation of negligent operation was not supported by any applicable standards. They did nothing to back up their allegations of gross negligence with evidence and so the motion for summary judgment was properly granted.

The Jamells seek to support their allegation that an issue of fact exists by alleging that the Chesapeake Circuit Court decided their case presented a jury question. See Petition p. 5. This is misleading. Under Virginia law, a court cannot consider matters outside of the pleadings in a hearing on a Demurrer, and specifically cannot consider depositions even in a motion for summary judgment. See Va. Code § 8.01-420. Therefore, the state court did not

have the benefit of the affidavits, deposition transcripts, and other records which were before district court.

At pages 6-7 in the Petition, the Plaintiffs misstate the law regarding gross negligence. In citing cases hailing from Texas, the Plaintiffs impart the impression that gross negligence can be found by aggregating single acts of negligence. The Virginia Supreme Court has specifically addressed this issue. In *Mitchell v. Wilkerson,* the court stated that "where the subject is fully discussed, we will see that something more than a mere breach of two or more statutory duties imposed upon a [defendant] is required in order to sustain a finding that he has been guilty of gross negligence." 193 Va. 121, 67 S.E.2d 912 (1951). "In the final analysis and weighing of the evidence, the question is not what or how many statutory violations can be said to have been established or how many acts of negligence have been proved. One act of simple negligence may violate several statutes. The decisive legal question is: Did [the defendant's] conduct, his acts of commission and omission, show such utter disregard of prudence as to constitute total indifference and complete disregard of the safety of his guest?" *Hershman v. Payne,* 196 Va. 241, 83 S.E.2d 418 (1954), followed in *Doerr v. Barnes, Adm'r,* 198 Va. 306, 94 S.E.2d 271 (1956). Thus, even if the Plaintiff had successfully presented an issue of fact as to several acts of simple negligence, what is important is the nature of the alleged negligence. In the present case, the facts simply do not support the degree of indifference necessary for a finding of gross negligence.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN NOT CONSIDERING THE PLAINTIFFS' UNTIMELY AFFIDAVITS

In the district court, the Plaintiffs failed to file timely evidence supporting the allegations in their Complaint. Because the Plaintiffs failed to file their responding information before the date of the second hearing on Defendant's motion, the district court held that the evidence the Plaintiffs submitted in the interim between the hearing and the date of its decision was not in accord with Rule 56, the initial pretrial order, or the extension of time granted to Plaintiffs. The district court held that the materials were untimely and, even if the Plaintiffs' exhibits had been timely filed, they would not have affected the outcome of the summary judgment motion. App. at 17. This was not an abuse of discretion. See *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 894 (1990). Plaintiffs later submitted further affidavits, but these referred to other documentation which was not attached. The district court, in considering these, held that nothing in the affidavits assisted the Plaintiffs, they were not timely submitted, and that they were not to be part of the record. App. at 26.

On appeal, the only mention of the exhibits is in footnote 2 of the unpublished per curiam opinion. There, the court of appeals states "On appeal the Jamells relied in part on certain affidavits submitted to the district court after the summary judgment had been awarded to the City. By order dated August 4, 1995, the district court declined to consider these affidavits because they had not been timely filed. We find no error in this ruling, and consequently we, too have not considered the untimely

affidavits." The court does not stipulate whether it considered the materials filed before the award of summary judgment. In any event, the fact that the court did not consider untimely exhibits which the lower court had held were not a part of the record and would not have changed the outcome in any case, cannot be erroneous. See *RGI v. Unified Industries, Inc.*, 963 F.2d 658 (4th Cir. 1992) (district court did not commit error in refusing to consider supplemental affidavit submitted after court had granted summary judgment).

CONCLUSION

This case does not present matters of compelling interest to the Supreme Court of the United States. Instead, it is a simple tort case which rests on issues of state law. In order to recover, the Plaintiffs must successfully prove gross negligence, but after substantial discovery, they failed to support their allegations with any facts. Therefore, upon the Defendant's fully supported motion for summary judgment, both the United States District Court and the United States Court of Appeals for the Fourth Circuit properly dismissed all claims.

The Defendant requests the Court to deny a Writ of Certiorari and to grant its taxable court costs.

Respectfully submitted,

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Norfolk, Virginia 23510-2230

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, an infant who sues by his mother as next friend CAROL A. JAMELL, and CAROL A. JAMELL, individually,

Plaintiffs,

v.

CITY OF CHESAPEAKE, A Municipal Corporation,

Defendant.

CIVIL ACTION NO. 2:95cv249

OPINION AND ORDER

I.

On March 13, 1995, plaintiff Mark Jamell (Mark), an infant, by his mother and next friend, Carol A. Jamell, and Carol A. Jamell (Carol) instituted this action to recover damages for injuries received by Mark, and funds expended in medical expenses by Carol for Mark, against City of Chesapeake (City), a municipal corporation in Virginia. The complaint alleges that on March 24, 1991, City had before and on said date owned and operated Locke Park in City; that the park contained playground and sliding board/jungle gym equipment; that the city was grossly negligent in failing to provide a slide board unit with proper safety features, including a protective guardrail to prevent a child from falling through or getting off the slide; that defendant failed to warn plaintiff and others upon entrance, of the height, weight and age

limit for use by the child and proper soft material surface in and about the slide area; that defendant failed to provide the requisite surface mandated by industry standards; that "Mark Jamell, a child of four years of age, states that the defendant failed to provide the necessary and proper care and attention to the sliding board unit and therefore was grossly negligent" (Par. 6 of complaint); that on or about March 24, 1991, defendant failed to have anyone in charge of the park and defendant failed to correct the defects in the equipment; that Mark got on the slide operated by City, and was unaware of the condition of the sliding board; that the gross negligence of defendant set out in the complaint caused Mark to fall and injure himself; and that Carol has incurred medical expenses on behalf of Mark. Plaintiffs seek compensatory and punitive damages from the City.

City filed its answer and defenses on May 26, 1995, admitting it owned and operated the recreational park known as Locke Park which was for use of children and adults. It denied each allegation of any negligence or lack of due care or failure to properly inspect and maintain the park. Further, it denied it was guilty of any gross or wanton negligence and denied that the complaint set forth a cause of action against it. At the same time, City filed a Rule 12(b)(6) motion to dismiss for failure to state a cause of action. Particularly, City asserts that the complaint fails to allege facts sufficient to meet the test of "gross negligence" which it must meet to comply with the provisions of the Virginia Statute, Virginia Code Section 15.1-291. Secondly, defendant asserts that plaintiffs may not recover punitive damages; and that the City is immune from liability except as provided for in the above

mentioned statute. Plaintiffs filed a motion to quash the motion to dismiss to which defendant responded.

Prior to filing this action, plaintiffs had filed an action against City in the Circuit Court of the City of Chesapeake in which considerable discovery was taken. Plaintiffs thereafter non-suited that action and instituted this suit.

Defendant filed affidavits, exhibits and depositions in support of its motion to dismiss and converted it into a motion for summary judgment. An initial pretrial conference was held June 22, 1995, fixing cut-off of time for discovery, dates for attorney's and final pretrial conferences, date of trial and for completion of *de bene esse* depositions. In that initial pretrial order, the Court noted pending motions to quash and to dismiss. The order set forth that plaintiffs' reply to the motions should be received on or before July 7, 1995, and a hearing on the motions was set for July 17, 1995. On July 10, 1995, counsel for defendant sent a notice to counsel for plaintiffs reminding counsel that the hearing on defendant's motion to dismiss pursuant to Rule 12(b)(6) and Rule 56[1] was scheduled for July 17th, 1995 at 2:00 p.m. As had been provided by the initial pretrial conference order, all counsel duly appeared on July 17th. Counsel for plaintiffs sought a few day [sic] continuance and asserted he would

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[1] Pursuant to Rule 12(c), when matters outside the pleadings are presented to and not excluded by the Court, the motion is to be treated as a motion for summary judgment. The Court permitted the affidavits and other matters to be fled [sic] and since they are being considered, the motion is treated as one for summary judgment.

file such affidavits as he felt necessary. The Court agreed to grant the request and counsel agreed the motion would be continued and heard on July 20, 1995 at 2:00 p.m. o'clock.

At the hearing on July 20th, counsel for plaintiffs sought to file what appears to be a statement of the qualifications of Dan Griffin with photo copies of pages from some type of handbook for playground safety regulations. Defendant objected to it being filed. It was marked for identification as Plaintiffs' Exhibit 1, but not admitted. The Court advised it would later decide whether it could be filed. While counsel for plaintiffs stated during oral argument on July 20th that he had sent the Clerk's Office affidavits to be fled [sic] in opposition to the motion for summary judgment, no such affidavits have been received by the Clerk or the Court as of this date.

II.

A.

Carol's deposition sets out that on the day of the accident, at about 3 o'clock, Carol and a friend had gone with Mark to Locke Park. After refreshments, Mark went to play on the gymnasium or the playground area. The playground area was full of children. Carol and her friend were seated in the picnic area at a picnic table reading the newspaper. She could see the playground area from where she sat. Mark had played for about a half an hour while she read a newspaper. While she was reading the newspaper, a man brought Mark over to her. Mark had a bloody nose, had sand on his face and was crying., The man said that Mark had fallen and that his

knee hurts. She took Mark to her car and noted a large knot on his thigh. She then took him to Patients First and had an X-ray and learned his leg was broken. She did not know the man who brought Mark to her and did not get his name. At Mark's direction, she marked on a photograph with an "X" the point where Mark told her he fell from and with an "0" where he said he landed on the ground. She agreed that the only person who knows where Mark fell from and landed is Mark. She said Mark told her he was on the slide and fell from it. Mark's testimony is hereafter set forth.

B.

The affidavits filed by City in support of its motion for summary judgment will be individually dealt with.

1. The affidavit of Patricia L. Mellon, Liability Claims Specialist for City for the past 10½ years, asserts that she assists in the coordination, investigation and resolution of claims against City; that as a result of her investigation, she was unable to find any suggestion that any lawsuit had ever been filed as a result of any injury at the playground equipment in Locke Park and particularly for the period of five years prior to the alleged date of Mark's accident. Nor could she find any notice from any individual with regard to allegedly hazardous conditions on the sliding board or play equipment; and she has no personal knowledge of any lawsuit or claim having been presented on behalf of any person as a result of injuries at the park.

2. The affidavit of J. Pat Kallaher, Superintendent of Buildings and Grounds, including grounds in the parks,

for City for the past 14 years, asserts that the playground equipment at Locke Park was purchased and installed by the Manufacturer's Representative of Miracle Recreational Equipment Company (Miracle) in 1987; that it is a well-known manufacturer of said equipment; that City neither designed, built or installed said equipment and has not modified it since it was originally installed; that it had been maintained by City since its installation; that there is a standard procedure for inspection of the park and equipment monthly and such was being done in 1990 and 1991; and that to the best of his knowledge no claim has been presented for injury or damage as a result of the condition of the equipment or the sand base material since the installation of the equipment in 1987. Attached to his affidavit are copies of the purchase order, *et seq.*

3. Affidavit of Barbara O. Olfers, a Crew Supervisor of Parks, who has worked for the City some 17 years, asserts that she makes inspections of parks and playgrounds; that for four months prior to Mark's injuries of March 24, 1991, she inspected the equipment in Locke Park in December 1990, January 1991, February 1991 and March 12 or 13, 1991. Copies of her inspections are attached which show that she personally checked the playground equipment and the sand base. It is also shown that from time to time since the original installation, sand has been added to the base and it had been roto-tilled in December 1990. Further affiant says she did not know of a complaint ever being made regarding depth of the sand.

III.

Defendant has moved the Court to strike plaintiffs' motion for an award of punitive damages grounded in the assertion that except where permitted by statute, punitive damages may not be awarded against a municipality in Virginia. Counsel have not brought to the attention of the Court any such statute and there is no such statute. Nor have counsel called to the attention of the Court any decision of the Supreme Court of Virginia holding that punitive damages have been or may be awarded against a Virginia municipality. However, there are two decisions of circuit courts of Virginia, one written by Judge Bernard G. Barrow, then of the Circuit Court of Virginia Beach, in the case of *McDonnell v. Hampton Roads Sanitation District*, 5 Va. Cir. 149 (1984), and the other by Judge John F. Daffron, Jr. of the Circuit Court of Chesterfield County in the case of *Wilson v. Commonwealth of Virginia*, 17 Va. Cir. 144 (1989), each holding punitive damages are not recoverable against a municipal corporation. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-260, 101 S. Ct. 2748, 2756 (1981), the court dealt with the question of whether punitive damages might be awarded against a municipal corporation. In holding punitive damages were not recoverable against a municipal corporation, it pointed out that at the time Congress enacted §1983 "the immunity of a municipal corporation from punitive damages at common law was not open to serious question" and while a municipality, like a private corporation, was to be treated as a natural person and subject to suit for a wide range of tortious activity, but such understanding "did not extend to the award of punitive or exemplary damages." The opinion further

pointed out that the "courts that had considered the issue. . . . were virtually unanimous in denying such damages against municipal corporations," (citations omitted) [and] "has persisted to the present day in the vast majority of jurisdictions."

In the opinion, the court cited numerous cases from the state courts holding that punitive damages should not be awarded against municipal corporations – as they viewed them as contrary to public policy and such an award would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. In footnote 21, 453 U.S. at 260, 101 S. Ct. at 2756, the court points out that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." Finally, the court concluded, "[I]n sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials." 453 U.S. at 271, 101 S. Ct. at 2762. *See also Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 3106, n.13 (1985); *Angell v. Leslie*, 832 F.2d 817 (4th Cir. 1981); *Heritage Homes of Attleboro v. Seekonk Water District*, 670 F.2d 1 (1st Cir. 1982), *cert. denied*, 102 S. Ct. 2934; *Haynesworth v. Miller*, 820 F.2d 1205 (D.C. Cir. 1987); *Wolf v. City of Wichita*, 833 F.2d 842 (10th Cir. 1989); *Gregory v. Chehi*, 843 F.2d 111 (3rd Cir. 1988); *Wilson v. City of Wheeling*, 19 W. Va. 323, 350 (1882); *Fairbanks v. City of Bradenton Beach*, 733 F.Supp. 1447 (M.D. Fla. 1989); *Jones v. City of Chicago*, 639 F.Supp. 140 (N.D. Ill. 1986); 57 Am.Jur.2d p 635, subject Municipal County, School and State Tort Liability, par. 694. However, even if the City was not immune from punitive damages, the evidence in this case would not justify an award of punitive damages.

IV.

Jurisdiction of this Court is grounded in the allegations of diversity. Since this action arose in Virginia and this suit was filed in Virginia, Virginia law applies. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243, 102 S. Ct. 252, 259 (1981); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4, 96 S. Ct. 167, 168 (1975); *In re Natahala Village, Inc.*, 976 F.2d 876, 880 (4th Cir. 1992); *Thornton v. Cesna Aircraft Co.*, 886 F.2d 85, 87 (4th Cir. 1989).

In order for plaintiffs to recover in this action, they must establish that City was guilty of gross or wanton negligence.

The legislature of Virginia has given immunity to cities, counties and towns in the operation of recreational facilities for negligence unless the negligence be gross or wanton. The Code of Virginia Section 15.1-291 provides:

> § 15.1-291. Liability of counties, cities, and towns in the operation of recreational facilities. – No city or town which shall operate any bathing beach, swimming pool, park, playground, skateboard facility, or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility.

> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute. (Code 1950, § 15-714; 1962, c. 623; 1979, c. 277; 1990, c. 18.)

In Virginia "the law recognizes three degrees of negligence, (1) ordinary or simple negligence, (2) gross, and (3) willful, wanton and reckless." *Griffin v. Shiveley*, 227 Va. 317, 315 S.E.2d 210, 212 (1984).

The distinction between simple or ordinary negligence, gross negligence and wanton negligence is one of degree. We need not here be concerned with wanton negligence as that is of a higher degree than gross negligence. Negligence in its broad term is the lack of reasonable or ordinary care, the doing of an act an ordinarily prudent person would not have done under the circumstances or the failure to do what an ordinarily prudent person would have done under the circumstances. To establish negligence there must be violation of a legal duty to use reasonable care, the violation of which proximately causing injury to another or the failure to exercise that degree of care which a reasonably prudent person would have exercised under the circumstances. In *Gossett v. Jackson*, ___ Va. ___, 457 S.E.2d 97, 100 (1995), the court defined simple negligence "as the failure to exercise 'that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another.' " citing *Griffin v. Shiveley*, 227 Va. 317, 321, 315 S.E.2d 210, 212-13 (1984).

To "constitute actionable negligence, a legal duty must exist, and there must be a violation of that duty with resulting damage." *Burdette v. Marks*, 244 Va. 309,

421 S.E.2d 419, 420 (1992). Negligence "constitutes an actionable tort only when it is shown to be the proximate cause of an injury." *Farren v. Gilbert*, 224 Va. 407, 297 S.E.2d 668, 671 (1982).

The mere happening of an accident is not proof of negligence. *Edlow v. Arnold*, 243 Va. 345, 415 S.E.2d 436 (1992). Nor may negligence be presumed from the mere occurrence of damages. *Parham v. Albert*, 244 Va. 73, 418 S.E.2d 866 (1992). The evidence must prove more than a probability of negligence. *Page v. Arnold*, 227 Va. 74, 314 S.E.2d 57, 61 (1984). The burden of proof of negligence rests solely on the plaintiff and does not shift. *Rogers v. Marrow*, 243 Va. 162, 413 S.E.2d 344 (1992). A defendant has no duty to prove he was not negligent, because plaintiff has the affirmative burden of proving negligence on the part of the defendant. *Davoudlarian v. Krombein*, 244 Va. 88, 418 S.E.2d 868 (1992).

Before a party "is entitled to an instruction on negligence or contributing negligence . . . there must be more than a scintilla of evidence introduced on the subject. *Yeary v. Holbrook*, 178 Va. 266, 267-68, 198 S.E. 441, 451 (1938)." *Ring v. Poelman*, 240 Va. 323, 397 S.E.2d 824, 827 (1990). *See also Charleston Area Medical Center, Incorporated v. Blue Cross and Blue Shield Mutual of Ohio, Incorporated*, 6 F.3d 243, 248 (4th Cir. 1993); *Lust v. Clark Equipment Co.*, 792 F.2d 436, 437 (4th Cir. 1990).

To recover "against the owner of premises, an injured invitee must first establish the existence of an unsafe condition on the premises." *Kendrick v. Vaz, Inc.*, 244 Va. 380, 421 S.E.2d 447, 450 (1992).

Gross negligence is the "absence of slight diligence or want of even scant care." *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184, 189 (1991). In *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310, 311, the court held that Meagher's acts "do not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard of prudence. . . . [W]e hold as a matter of law, that Meagher's acts did not constitute gross negligence. . . . " "Gross negligence . . . requires proof of something more than the lack of ordinary care. *Reed v. Spencer*, 187 Va. 530, 535, 47 S.E.2d 359, 361 (1948)." *Community Motor Bus Company, Inc. v. Windley*, 224 Va. 687, 299 S.E.2d 367, 369 (1985). In *Windley*, the court defined gross negligence by citing its definition found in *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971). "Gross negligence is that degree of negligence which shows indifference to others as constituting an utter disregard of prudence amounting to a complete neglect of the safety of the guest. It must be such a degree of negligence as would shock fair minded persons although something less than willful recklessness." *Windley*, 367 S.E.2d at 369.

While issues of causation are to be decided by the jury, "whether the evidence is sufficient to create a jury issue is solely a question of law to be determined by the court." *Charleston Area Medical Center*, 6 F.3d at 247 (4th Cir. 1993); *Miller*, 608 F.2d at 981, n.8. In diversity cases where the "sufficiency of the evidence to create a jury question is presented, this court resolves the issue based on federal rule." *Charleston Area Medical*, 6 F.3d at 247; *Watchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061, 1065-66 (4th Cir. 1969). *See also Brendles Stores, Incorporated*, 978

F.2d 150, 157 (4th Cir. 1992). "That rule presents the question whether there is evidence on which a jury properly can base a verdict." *Id.*

V.

On a motion for summary judgment, the Court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. *Nebraska v. Wyoming*, ___ U.S. ___, 113 S. Ct. 1689, 1694 (1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2516 (1986); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 115 S. Ct. 67, and *cert. denied*, 115 S. Ct. 68 (1994). The plaintiffs are entitled to have the credibility of all of their evidence presumed. Even so, the opposing parties "must demonstrate that a triable issue of fact exists, they may not rest upon mere allegations or denials." *Anderson*, 477 U.S. at 248, 106 S., Ct. at 2510; *Shaw*, 13 F.3d at 798. A mere scintilla of evidence supporting the case is insufficient. *Id.; Charleston Area Medical Center*, 6 F.3d at 248. Rule 56(e) makes clear "that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 289. 88 S. Ct. 1575, 1592-1593 (1968). The non-mover's contention the facts are in dispute will not suffice. *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976). Once the moving party states "in an affidavit sufficient facts to sustain a motion for summary judgment in his favor, the burden [shifts to the opposing party] to establish that there is a 'material issue of fact.' " *Catawba Indian Tribe v. State of South Carolina*, 978 F.2d 1334, 1341 (1992), *cert. denied*, 113 S. Ct. 1415 (1993). As pointed out

in *Atkinson v. Bass*, 579 F.2d 865, 966 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978), when defendant files a motion for summary judgment "*positive* action was demanded of plaintiff, F.R.Civ.P. 56(e) explicitly admonishes that he could not then simply 'rest' on his complaint – that he must affirmatively respond." Continuing, the court pointed out that plaintiff did nothing and was subject to the discipline of the rule which provides "[I]f he [plaintiff] does not so respond, summary judgment, if appropriate, shall be entered against him [plaintiff]." (Citations omitted). The failure of a litigant to file counter-affidavits or depositions may be treated as a conscious waiver, and a "failure to conduct any discovery or submit any opposing affidavits . . . can only be viewed as a waiver of such rights." *Morrissey v. William Morrow & Co., Inc.*, 739 F.2d 962, 966 (4th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985). *See also Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1254 (1995). In *Cray*, the court pointed out that under *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), the moving party is entitled to summary judgment under Rule 56 against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which party will bear the burden of proof at trial.

The Supreme Court of Virginia dealt with the above quoted statute and what constituted gross negligence in *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688, 690 (1987) holding that the General Assembly by the statute "intends to limit the civil liability of municipalities in the maintenance and operation of any recreational facilities

to cases of gross negligence." There, the court summarized the evidence which shows the injured party was 13 years of age. He was attending a convention at Chrysler Hall and performing with a church choir by playing the drums. He was seated at the drums in the rear of the orchestra pit which was in front of the stage. It was a platform which could be positioned level with or below the stage. At time of the accident, the pit had been lowered so that there was a gap between the rear of the pit and the front of the stage. There was no barrier or railings in place on the rear perimeter of the pit platform. In trying to retrieve a drum stick which plaintiff had dropped, he leaned back on his stool, lost his balance and went over and was injured when he fell through the gap 18 feet into the basement of the building. Testimony showed the city was in violation of its own building code because railings were not in place on the pit platform, and that the city possessed barriers specifically designed to provide protection against falls through the gap. Plaintiff also presented evidence that 2 years prior to this accident a 6 year old child fell from the pit into the basement when pit barriers were in place. The trial court directed a verdict for defendant which the Supreme Court affirmed, holding "that plaintiff failed to establish a *prima facie* case of gross negligence," saying "failure to install protective devices or to post warnings for children at a platform edge . . . amounts, at the most, to ordinary negligence and a failure to exercise reasonable care." 362 S.E.2d at 691. There, the court defined gross negligence as "that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation

of legal duty respecting the rights of others. . . . Gross negligence amounts to the absence of slight diligence, or the want of even scant care." (Citations omitted) 362 S.E.2d at 691.

VI.

The item marked at the July 20th hearing as "Plaintiffs' Exhibit 1" for identification was not timely presented, or in accord with Rule 56 or the initial pretrial order, or the extension of time granted plaintiffs on July 17th within which to file affidavits or other evidence in opposition to defendant's motion for summary judgment. *See Lujan v. National Wildlife Fed.*, 497 U.S. 871, 110 S. Ct. 3177, 3192 (1990); *Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993). In addition, the statement of qualifications is not signed by anyone and the attachments thereto carry no signatures or authentications. In their present form, they would not be admissible in evidence at a trial. Nor would the pamphlets or treatises attached would not [sic] be admissible as an exhibit. *See* Rules of Evidence, Rule 803(18). The same is true of a letter dated July 24, 1995, marked received July 24, 1995, and "marked for identification as P.-2" to which is attached pages from a deposition of Mark taken June 8, 1994, along with what appears to be two xerox copies of two photographs of the slide unit. However, the copies of said photos do not show the "0" (circle) and "X" (cross) which marked the place Mark jumped from and where he landed. A copy of the full deposition of Mark is also attached. However, a full copy of said deposition had already been filed by defendant as part of its motion for summary judgment. Hence, that full deposition is already before the Court. Otherwise, since

this copy of the deposition was not timely filed, it would not be considered. But, the deposition having already been filed, it will be given full consideration. *Lujan* made it clear the court "did not abuse its discretion in declining to admit" affidavits not timely filed. 497 U.S. at 894, 110 S. Ct. at 3192. Too, in keeping with *Lujan*, the Fourth Circuit in *Orsi* affirmed the action of the trial court in refusing to consider documents offered on the day of the hearing "on the motion for summary judgment purposes because it found them to be untimely and unauthenticated." 999 F.2d at 91. But even if the two documents had been timely filed, it would not have affected the outcome of the motion for summary judgment.

VI.

Plaintiffs' complaint alleges defendant was guilty of gross negligence in that it (1) failed to provide a sliding board unit with proper safety features, including a protective guardrail to prevent children from falling; (2) failed to warn of the height, weight and age limitations for use of the proper soft material surface in and about the slide area in the event of a fall; (3) failed to provide the requisite surface mandated by industry standards; and (4) failed to have any person in charge of the park and failed to correct defects in the equipment.

Most of the allegations are not allegations of facts, but conclusions. Even so, none of the allegations of any facts in the complaint reach the test of gross negligence. Even if the allegations reached the test for gross negligence, they are not supported by any evidence.

It is undisputed that the mother and friend who accompanied Mark to the park did not see Mark fall or jump at the time of his injury, nor do they know of their own knowledge what caused his injury. The only evidence of how and what caused Mark's injury is his own testimony.

As set out above, the first allegation of negligence alleged against the City is an alleged failure to provide a sliding board unit with proper safety features, including a protective guardrail to prevent a child from falling through and getting hurt. The day of or the day after the accident, one of Mark's grandparents went to the park and took pictures of the slide. They were attached to Mark's or his mother's deposition. Except for the pictures, there is little description of the slide unit. There is no testimony or other evidence that the sliding board unit was defective or failed to meet any known safety standard. Neither Mark nor his mother complained of or testified there was any defect in the unit. The allegation of a failure to provide a unit with a protective guardrail to prevent a child from falling through is of no consequence, for Mark did not fall through any guardrail or from the slide unit. Nor is there evidence that the guardrail was defective. Mark crawled through the railing and jumped.

The evidence establishes that the piece of equipment in question was purchased in 1987 by City from Larry Hasley and Associates (Hasley), manufacturer's representatives for Miracle Recreational Equipment Company (Miracle). Miracle was known to the City as a well known manufacturer of playground equipment. The equipment was furnished and installed by Miracle and Hasley. The

City conducted a monthly inspection of all of said equipment, records filed with affidavits of those who conducted such inspections show an inspection of this piece of equipment in December 1990, and January, February and March of 1991, and the finding of no defects in it. City never designed, manufactured or installed said equipment, nor did it make any modifications to the equipment from date of purchase up to the date of the accident in issue, except to replenish some sand.

Here, there is no evidence of any improper or faulty design, manufacture or installation of the equipment or that it does not meet industry standards. Nor is there any evidence that it was in anyway dangerous for use by children.

Secondly, the allegation is that City failed to warn of the height, weight and age limitations for the use of the proper soft material surface in and around the slide. But, plaintiffs fail to show what the warning should be or what the height or age limit should be. The unit was a two slide unit for sliding, not for jumping. Mark's mother testified she did not go over to the slides with Mark on the day of the accident. Mark was four years old. Whether he could have read and understood any warning which might have been posted is a guess. But, his mother had observed the slide unit on prior occasions when she and Mark went to the park. She said Mark had been to the park several times before and played on the same slides. Her idea of what a warning sign should have been was "play at your own risk, park is not responsible for upkeep of equipment." (Dep. of Carol, February 2, 1994, p. 20). Further, she said there should be a sign saying children under a certain height or a certain age shouldn't

be allowed to play on equipment that is too tall for them. But no one has ever told her the equipment at the park was too high for Mark's age. Continuing, she testified "[I] had no reason to believe that it was too high. It was supposedly completely enclosed so that the portion that was seven feet from the ground, could not, you could not fall from it because it was enclosed." (Dep. of Carol February 2, 1994, p. 21). Carol marked on a photo of the unit the point where Mark told her he fell or jumped from with an "0" and where he landed with an "X".

Since there is no evidence of any danger to a four year old or that the unit was not suitable, there was no reason to post any warning.

Without challenge, the evidence establishes the City had never had a report of an injury by a child or any person falling or jumping off of the slide unit, or of any kind of injury or any complaint that the slide was too high, or of any failure to properly maintain or care for the slide. Such was not limited to this particular unit, but it applies to all other similar units in the parks operated by the City. No evidence has been presented to even suggest that said unit bears any defect or fails to meet safety standards applicable to such equipment for use in City parks.

In his deposition of June 8, 1994, Mark testified he had never been to Locke Park before the date of the accident, March 24, 1991.[2] He was 7 years old at the time of his deposition and 4 years old at the time of his

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[2] His mother testified he had been there several times before.

accident. He testified his mother told him to play on the equipment he was playing on. He marked on one of the photographs with an "0" the point he fell or jumped from and an "X" where he landed. He pointed to the "0" and said he jumped off there. When asked how he got to the place where he jumped from, he said:

> A. There was a little hole there with – with a piece right here and partway from it and one little thing here. When I squeezed through I got to get on the other side of the bridge when I went over this way, then I went back and all of a sudden I couldn't squeeze through there, so I jumped down. (Mark's Dep. June 8, 1994, p. 13)

He said he climbed through the horizontal bars where he placed the circle, but later said they were the vertical bars – the ones that go up and down. He described his actions, saying:

> A. I was climbing on the outside, but I was trying to get in and I couldn't, so I went back. I was trying to get in, but then I couldn't get through that either.
>
> Q. Okay. Then what did you do?
>
> A. I jumped.

Neither Mark nor any other person ever mentioned there was any foreign material on the slide or platform or any defect, except some sand on the steps. Nor has anyone suggested any defect on anything that had any part to play in the reason for his jump. Nor did he mention any part of the equipment was broken or defective, or that there were any loose boards or any other defect in the unit. Mark had been to Locke Park several times before and played on the slides. Carol had observed the height

of the slides before the date of the accident and saw nothing wrong with the slides.

Thirdly, plaintiffs assert, without any evidence to support the assertion, that City failed to provide a surface mandated by industry standards. At this point, the only evidence of what surface is mandated is that sand is the proper surface. Sand was installed with the unit in 1987, and has been replenished from time to time by the City. There is no evidence of the depth of the sand on the date of the accident, or what depth the industry requires or recommends. Mark said when he jumped, he landed on his stomach (Dep. of Mark June 8, 1994, p. 22-23).

Lastly, plaintiffs allege in paragraph 7 of the complaint that defendant failed to have any person in charge of the park and failed to correct the defects of the equipment. Since plaintiff has not presented any evidence to establish any defects in the equipment, these assertions establish nothing. The affidavits and daily records of the City establish that there were City employees in charge of the park and its maintenance and that there were no known defects. Even if the plaintiffs had presented evidence to establish the alleged defects, such would only establish simple negligence, but certainly not gross negligence.

There is absolutely no evidence of negligence on the part of City. It had periodic inspections made of the equipment in the park. It had purchased the equipment from a reputable manufacturer. The record is totally void of any evidence that could be said to show "an absence of slight diligence," or "want of scant care," or "an utter

disregard of prudence," or "an indifference to others" or a "complete neglect of the safety of the guest."

What the court said in *Kendricks* in affirming the action of the trial court in setting aside the jury verdict and entering judgment for defendant is particularly applicable here, i.e., "to find that [an unsafe condition] did exist would involve the rankest of speculation based on the evidence." 421 S.E.2d at 450. Continuing, it said "neither the aggregate of Kendricks' testimony, nor any other evidence adduced at trial, provided the jury with a basis for anything more than conjecture regarding whether an unsafe condition existed in the ground surface around and underneath the merry-go-round." 421 S.E.2d at 450.

There being no dispute of any material fact necessary to establish any right of plaintiffs to recover damages in the case, the defendant's motion for summary judgment is GRANTED and this action is DISMISSED.

Copy of this Opinion and Order is forwarded to counsel.

/s/ Richard B. Kellam
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
July 28th, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MARK JAMELL, an infant who sues by his mother as next friend CAROL A. JAMELL, and CAROL A. JAMELL, individually,

Plaintiffs,

CIVIL ACTION NO. 2:95cv249

v.

CITY OF CHESAPEAKE, A Municipal Corporation,

Defendant.

ORDER

On this August 2, 1995, the Court received a letter of even date from counsel for plaintiff in the above styled matter to which is attached an affidavit of O. S. Jamell with a page titled "INDEX" with the word "WITNESS:" under which appears the name "Dan E. Griffin" and the word "EXHIBITS" followed by some number 10 listings made a part thereof. Following that page are affidavits of H. R. Schippell, Dan E Griffin (the 3 above listed affidavits are dated July 18, 1995), Curtis Ray Cayton and Bettie Gray Culverhouse (these two affidavits are dated August 1, 1995). Counsel requests the said papers be made a part of the record in this case. The affidavit of Jamell sets forth that he testified in discovery proceedings as a witness "as set out in the transcript of the evidence, a copy of which is attached"[1] and he "reiterates

[1] No transcript was attached.

and confirms all of the evidence in said transcript and does testify that the allegations in the complaint attached hereto[2] as an exhibit are true." The affidavit of Schippell sets forth certain qualifications and says he read the testimony "heretofore given by architect Dan E. Griffin[3]. Moreover, that he has read the complaint filed in [this court] . . . and is definitely of the opinion that the allegations set forth in the complaint are applicable to the situation as claimed in the said complaint." Continuing, the affidavit sets out "the Defendant was grossly negligent in permitting the sliding board and the equipment to be used because the openings wherein the child fell should not have been as large under any of the circumstances as have been used by the Defendant. Additionally, the area should have been inspected more often in connection with proper soft landing."

The affidavit of Griffin, after setting forth certain qualifications as an architect, sets forth that he viewed "the premises and the playground equipment involved, which is a subject matter of the litigation; that he testified under oath . . . to the deficiencies in discovery proceedings, a copy of the transcript is attached herewith.[4] That he confirms and corroborates that the said testimony was true and is true and correct."

The affidavit of Cayton and Culverhouse merely deal with their handling of the aforesaid affidavits.

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[2] No complaint is attached to the affidavit.

[3] Griffin's testimony is not a part of the record in this case.

[4] No transcript is attached nor is it a part of the record in this case.

While the request is that the Court make the aforesaid documents attached to the letter of August 2nd a part of the record in this case, these documents were not timely offered. Argument on the motion for summary judgment was had July 20, 1995 and the Court has already ruled on that motion. Actually, the adding of these documents would seem to make little or no difference because the transcripts and exhibits referred to are not attached, nor have they previously been filed as a part of the record in this case. Without the transcripts, the affidavits establish little or nothing. If the transcripts had been previously filed, there would seem to be no reason for the affidavits. In any event, nothing in the affidavits establishes any gross negligence which plaintiff was required to establish in order to recover.

These affidavits and documents fall into the same class as those referred to in the Court's order of July 28th. They were not timely submitted and are not to be made a part of the record in this case.

Copy of this Order is forwarded to counsel.

/s/ Richard B. Kellam
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
August 4th, 1995